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RECORD, CASE No. 13,564.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1891.

TERM No., 364. 41

HENRY W. POTTS, AS ASSIGNEE OF THE CHESTER TUBE AND IRON COMPANY, PLAINTIFF IN ERROR,

vs.

WILLIAM H. WALLACE.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF NEW YORK.

FILED MAY 28, 1889.

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1 New York Supreme Court, County of Kings.

HENRY POTTS, JR., as Assignee of the Chester Tube and Iron Company, Plaintiff,
against
WILLIAM H. WALLACE, Defendant.
} Summons.

To the above-named defendants:

You are hereby summoned to answer the complaint in this action and to serve a copy of your answer on the plaintiff's attorney within twenty days after the service of this summons, exclusive of the day of service, and in case of your failure to appear or answer judgment will be taken against you by default for the relief demanded in the complaint.

Dated March 14, 1881.

SIDNEY WARD,
Plaintiff's Attorney.

Office and post-office address, No. 120 Broadway, New York city, N. Y.

2 Supreme Court, Kings County.

HENRY POTTS, JR., as Assignee of the Chester Tube and Iron Company, Plaintiff,
against
WILLIAM H. WALLACE, Defendant.

CITY AND COUNTY OF NEW YORK:

Alfred B. Thacher, being duly sworn, says that he is of the age of over twenty-one years, and that on the 22nd day of March, 1881, at No. 131 Washington street, in the city of New York, in the State of New York, he served the annexed summons, together with the complaint therein mentioned, which is also hereto annexed, on William H. Wallace, the defendant in this action, by delivering a copy of the same to said Wallace, such defendant, personally and leaving the same with him. He further says that he knew the person served as aforesaid to be the person mentioned and described in the said summons as the defendant in this action.

ALFRED B. THACHER.

Sworn to before me this 31st day of March, 1881.

WILLIAM J. CAMPBELL,
Commissioner of Deeds, N. Y. City and Co.

3 New York Supreme Court, County of Kings.

HENRY POTTS, JR., as Assignee of the Chester Tube and Iron Company, Plaintiff,
against
WILLIAM H. WALLACE, Defendant.

Trial to be Had in the County of Kings.

The above-named plaintiff, by this his complaint, respectfully shows to this court and alleges on information and belief as follows:

That on or about the 13th day of December, 1877, the defendant and six other persons associated together for the purpose of forming a corporation in the State or Commonwealth of Pennsylvania, under the provisions of an act or public and general law of assembly of Pennsylvania approved April 29th, 1874, entitled "An act to provide for incorporation and regulation of certain corporations," and the supplements thereto, and did duly form such corporation as provided by said act and supplements under the corporate name of "The Chester Tube and Iron Company," and that said corporation became fully organized on or about the fifth day of January, 1878, by a full compliance with said act and supplements.

That said corporation was formed for the purposes of the
4 manufacture of iron or steel, or both, or of any other metal or of any article of commerce from wood or metal, or both; that the principal place where the business of said corporation was to be transacted was Chester, Delaware county, in the State of Pennsylvania; that the said corporation was to be perpetual; that the capital stock of said corporation was fixed at one hundred thousand dollars, divided into two thousand shares of the par value of fifty dollars each; that the whole amount of said capital stock was subscribed, and that the defendant subscribed for and agreed to take and pay for three hundred shares of said stock, of the aggregate par value of fifteen thousand dollars.

That said defendant did not fulfil the terms of his said subscription, but neglected to pay to said corporation the amount of his said subscription or any portion thereof and neglected to take and pay for the shares of said capital stock so subscribed for by him or any portion thereof.

That said corporation, "The Chester Tube and Iron Company," continued after its organization to transact the business authorized under its certificate of incorporation until on or about the fourteenth day of September, 1880, when the said corporation had become and was indebted to sundry persons, firms, and corporations in various sums of money, and thereupon, by its certain indenture of assignment dated on that day, duly executed by the authority and direction of its board of directors, under its corporate seal and in full compliance with law, it duly granted, assigned, bargained,
5 and sold, aliened, released, and confirmed to this plaintiff all and singular its lands, tenements, and hereditaments, moneys, property, goods, chattels, estate, and effects, real and personal, in trust, nevertheless, and to the uses and purposes in said deed speci-

fied, said uses and purposes being, in substance, to sell and dispose of all the real estate thereby conveyed, and pending such sale to collect the rents, issues, and profits thereof, and as to all the other property so assigned and transferred to take such possession thereof as the nature of the same would allow, and to sell and dispose of, assign, and transfer the same and to demand, sue for, collect, recover, and receive all and singular the debts, moneys, and obligations owing to said corporation, and after paying and discharging the expenses and charges incident to said trust to pay, appropriate, apply, and distribute the proceeds of said property and estate, real and personal, to and among all the creditors of said corporation, without preference or distinction, and in case any surplus should remain after the payment of said debts to return the surplus to said corporation; that in and by said deed said corporation gave to this plaintiff full power and authority to do all and every act and thing necessary and requisite to carry out the trusts thereby created and constituted, and appointed this plaintiff its true and lawful attorney irrevocable to ask, demand, sue for, levy, recover, and receive all sum and sums of money to it due and owing, and on receipt
6 thereof to give acquittance or other sufficient discharges in the law; that said deed, as by the laws of said Commonwealth of Pennsylvania required, was duly recorded in the office for recording deeds, &c., in and for the county of Delaware, Pennsylvania, in Book Z No. 4, page 213, &c., on said 14th day of September, 1880; that this plaintiff accepted the trusts created by said deed on the day of its date by writing endorsed thereon and signed by him, and made and executed his bond as such assignee and trustee, as required by law, with sufficient sureties; which bond, duly approved by the proper court, was filed in the office of the clerk of the court of common pleas in and for the county of Delaware, Pennsylvania, and that this plaintiff has power and is the lawfully constituted assignee of all and singular the assets and property of said corporation.

That as part of the debts and obligations due and owing to said corporation there has come into the possession of this plaintiff, under said deed, the subscription of said defendant for said capital stock of such corporation hereinbefore stated and set forth; that this plaintiff on or about the 11th day of October, 1880, duly demanded from the said defendant the payment of the said subscription, to wit, the sum of fifteen thousand dollars, but that said defendant neglected and refused to pay the same and has not paid the same or any part thereof, but is indebted to this plaintiff, as such assignee, upon his said subscription in the sum of fifteen
7 thousand dollars, with interest thereon from said eleventh day of October, 1880.

Wherefore plaintiff demands judgment against said defendant for the sum of fifteen thousand dollars, with interest thereon from the eleventh day of October, 1880, with costs of this action.

SIDNEY WARD,
Plaintiff's Attorney, 120 *Broadway, New York City, N. Y.*

STATE OF NEW YORK, }
City and County of New York, } *ss:*

Sidney Ward, being duly sworn, says that he is the attorney for the plaintiff in the foregoing complaint named, and that said complaint is true to his own knowledge except as to the matters therein stated to be alleged on information and belief, and as to those matters he believes it to be true; that the grounds of his belief are that he has in his possession a certified copy of the certificate of incorporation of the Chester Tube and Iron Company referred to in said complaint; that from said certificate the said company appears to have been duly organized under the laws of Pennsylvania; that the remaining facts alleged in said complaint were stated to deponent by the plaintiff personally or by letter, or appear from papers in deponent's possession, and that deponent believes the statements so made by said plaintiff and appearing in said papers to be true; that the reason this verification is made by deponent and
8 not by plaintiff is that plaintiff is not within the county of Kings, where deponent resides, nor in the county of New York, where he has his office.

SIDNEY WARD.

Sworn to before me this 15 day of March, 1881.

CHARLES C. DEMING,
Notary Public, N. Y. County.

Endorsed: Summons and complaint. Filed June 30, 1883.

N. Y. Supreme Court, Kings County.

HENRY POTTS, JR., Assignee of the Chester Tube and Iron Company,
against
WILLIAM H. WALLACE.

The defendant, answering the complaint herein, alleges:

I. The defendant admits that he and six other persons associated themselves together for the purpose of forming a corporation in the State of Pennsylvania by the name of the Chester Tube and Iron Company, but whether said corporation was ever duly organized or not this defendant has no knowledge nor information sufficient to form a belief, and therefore leaves the plaintiff to make such
9 proof of the same as he may be advised.

II. The defendant admits that if said corporation was duly organized that it was formed for the purpose of the manufacture of iron or steel, or both, or of any other metal, or of any article of commerce, from wood or metal or both, and that the principal place where the business was to be transacted was Chester, Delaware county, Pennsylvania, and that the corporation was to be perpetual, and that the capital stock was fixed at one hundred thousand dollars, divided into two thousand shares of the par value of fifty dollars each, and that this defendant subscribed for three hundred

shares of the stock, of the aggregate par value of fifteen thousand dollars; and this defendant alleges that he offered to pay for and take up said three hundred shares of stock, but that said corporation refused to deliver said stock to this defendant, but, on the contrary, notified him that they would not deliver or issue any stock whatever to him, and no stock ever was issued to the defendant.

III. The defendant has no knowledge nor information sufficient to form a belief as to whether said alleged corporation, the Chester Tube and Iron Company, ever sold, assigned, transferred, or set over unto the plaintiff, in trust or otherwise, or had the power or legal authority so to do, all and singular its property, both real and personal, or whether said alleged deed of trust was ever recorded, as in said complaint alleged, or whether said plaintiff accepted the
10 trusts created by said alleged deed by writing endorsed thereon or otherwise, or made and executed his bond, as required by law, with sufficient sureties, or whether said bond was duly approved by the proper court or was filed in the office of the clerk of the court of common pleas in and for the county of Delaware, Pennsylvania, or whether the plaintiff has the power or is the lawfully constituted assignee of all and singular the assets and property of said corporation.

IV. The defendant admits that the plaintiff made a demand upon him for the payment of said subscription, and that defendant did not pay the same.

V. The defendant denies that he is indebted to the plaintiff as such assignee in the sum of fifteen thousand dollars or in any sum whatever.

VI. The defendant has no knowledge or information sufficient to form a belief as to the other statements contained in said complaint not hereinbefore admitted or denied.

The defendant, further answering, by way of counter-claim alleges that said corporation, the Chester Tube and Iron Company, was indebted to this defendant and William Bispham, as copartners, composing the firm of William H. Wallace & Co., in the sum of seven thousand eight hundred and ninety-two and $\frac{11}{100}$ dollars, with interest thereon from September 4, 1880, for that the said corporation employed said firm of William H. Wallace & Co. as their agents to sell their goods in the name of the firm of Wm. H. Wallace & Co., undertaking and agreeing to fill all orders and con-
11 tracts which said firm might make or accept, and that in pursuance thereof the said firm did make and enter into contracts with various parties for the sale and delivery of a large quantity of goods, and that the said iron company failed to fill the orders and make and deliver said goods accepted by them and as requested and ordered by said firm, and that in consequence thereof the said firm of William H. Wallace & Co. became liable to and had to go into the market and fill said orders at an advanced price, whereby they had to pay the difference between what the said iron company had agreed to make and deliver said goods for and what it cost them in the open market, to wit, the said sum of seven thousand eight hundred and ninety-two and $\frac{11}{100}$ dollars; that said firm of

William H. Wallace & Co. duly assigned, transferred, and set over unto this defendant the said claim against said company as aforesaid, and that this defendant is now the lawful owner and holder thereof for value, and that no part thereof has been paid.

Wherefore this defendant demands judgment against the plaintiff for the sum of seven thousand eight hundred and ninety-two and $\frac{11}{100}$ dollars, with interest from September 4th, 1880, besides costs.

B. F. TRACY,
Def't's Att'y, 189 Montague St., Brooklyn.

KINGS COUNTY, *ss:*

W. H. Wallace, the above-named defendant, being duly
12 sworn, says that the foregoing answer is true of his own knowledge except as to matters therein stated to be alleged on information and belief, and as to those matters he believes it to be true.

Sworn to before me this 17th day of May, 1881.

JOHN P. HUDSON,
Notary Public, Kings Co.

Endorsed: Answer. Filed June 30, 1883.

New York Supreme Court, County of Kings.

HENRY POTTS, JR., as Assignee of the Chester Tube and Iron Company, Plaintiff,
against
WILLIAM H. WALLACE, Defendant.

The plaintiff, by Sidney Ward, his attorney, and alleging the matters herein on information and belief, for a reply to so much of the answer of defendant herein as is alleged by way of counter-claim, denies that he, said plaintiff, has any knowledge or information sufficient to form a belief as to whether the said corporation,
13 the Chester Tube and Iron Company, was indebted to said defendant and William Bispham, as partners composing the firm of William H. Wallace & Co., in the sum of $7,892.11, with interest from September 4, 1880, or in any sum whatever, upon any employment or agreement as alleged in said answer or otherwise, or whether said iron company agreed to fill all orders and contracts which said firm might make or accept, or whether said firm made or entered into contracts with various parties or any parties for the sale and delivery of a large quantity of goods or any quantity of goods, as alleged in said answer, which the said iron company was bound to fill under any agreement with said firm, or whether said iron company failed to fill orders and make and deliver goods which it was bound to fill or make or deliver under any agreement made by said firm with other parties, or whether said firm became liable to and had to go into the market and fill any such orders at an advanced price in consequence of the failure of said company to fill any such orders or deliver any such goods, or

whether they had to pay any difference between what said iron company had agreed to make and deliver said goods and what said goods would cost in the open market, as alleged in said answer, or whether by reason of any failure of said iron company to fill any such order or deliver any such goods said firm of William H. Wallace & Co. had to pay or did pay the sum of $7,892.11 or any other sum, or whether said William H. Wallace & Co. assigned to said defendant said alleged claim
14 against said iron company or not, or whether the said defendant is the owner of said alleged claim, and leaves the defendant to make such proof of said allegations as he shall be advised to make, insisting that the matters alleged in said answer by way of counter-claim do not constitute any defence to the plaintiff's claim in this action or any counter-claim herein.

SIDNEY WARD,
Plaintiff's Attorney, 120 Broadway, New York City.

STATE OF NEW YORK, }
City and County of New York, } *ss:*

Sidney Ward, being duly sworn, says that he is the attorney for the plaintiff in the foregoing-entitled action, and that the foregoing reply is true to his own knowledge except as to the matters therein stated to be alleged on information and belief, and as to those matters he believes it to be true.

That the grounds of his belief of the truth of the matters stated in said reply are statements made to him by the plaintiff, which statements he believes to be true, which statements are embodied in said reply; that the reason this verification is not made by the plaintiff but by deponent is that said plaintiff is absent from the city and county of New York, where deponent has his office, and from the county of Kings, where he resides.

SIDNEY WARD.

Sworn to before me this — day of August, 1881.
ALLAN McCULLOH,
Notary Public, New York County.

15 Endorsed: Reply. Filed June 30, 1883.

New York Supreme Court, County of Kings.

HENRY POTTS, JUNIOR, as Assignee of the Chester Tube and Iron Company, Plaintiff,
against
WILLIAM H. WALLACE, Defendant.

STATE OF PENNSYLVANIA, }
County of Dauphin, } *ss:*

Henry W. Potts, being duly sworn, says that Henry Potts, Junior, the plaintiff in the above-entitled action, died on or about the 29th day of September, 1881; that the said action is still pending

and undetermined, and that this deponent was, on the 6th day of March, 1882, appointed by the court of common pleas of Dauphin county the assignee of Chester Tube and Iron Company, in the place and stead of said Henry Potts, Junior, deceased, as provided by law; that the deponent has given a bond for the discharge of his duties as such assignee as required by law, which has been duly approved by said court; that said court, under the laws of the State of Pennsylvania, has full power and authority to make such
16 appointment, and that under such appointment this deponent has succeeded to and became possessed of all the property, estate, rights, and interests of said Chester Iron and Tube Company, and has succeeded to all the rights and interests of said Henry Potts, Junior, as assignee of said company, with all his powers, as stated and set forth in the complaint in this action, and, as he is advised and verily believes, is entitled to be substituted as plaintiff in said action, in the place and stead of said Henry Potts, Junior, deceased.

HENRY W. POTTS.

Subscribed and affirmed before me this 24th day of April, 1882.

EUGENE SNYDER,
[L. S.] *Notary Public.*

STATE OF PENNSYLVANIA, }
Dauphin County, } *ss:*

I, E. B. Mitchell, prothonotary of the court of common pleas Dauphin county, do hereby certify that Eugene Snyder, Esquire, was at the time the annexed and foregoing affidavit was made an acting notary public in said county and State, duly commissioned and qualified and authorized by law to administer oaths, take acknowledgements of deeds, &c., and that the signature hereto affixed, purporting to be his, is genuine.

Witness my hand and the seal of said court, at Harris-
[SEAL.] burg, this 24th day of April, A. D. 1882.

E. B. MITCHELL,
Prothonotary.

17 New York Supreme Court, County of Kings.

HENRY POTTS, JUNIOR, as Assignee of the Chester Tube and Iron Company, Plaintiff,
against
WILLIAM H. WALLACE, Defendant.

GENTLEMEN: You will please take notice that, upon the pleadings in this action and all other papers herein and upon the affidavit of Henry W. Potts, with a copy of which you are herewith served, I shall apply to this court, at a special term thereof appointed to be held, at the court-house, in the city of Brooklyn, Kings county, on the first day of May, 1882, at the opening of the court on that day, or as soon thereafter as counsel can be heard, for a rule or order

substituting Henry W. Potts, as assignee of the Chester Tube and Iron Company, as plaintiff in this action in the place and stead of Henry Potts, Junior, deceased, and that this action proceed in the name of Henry W. Potts, as aforesaid, as plaintiff.

Dated New York, April 28, 1882.

Yours, &c.,

SIDNEY WARD,
Plaintiff's Att'y, 120 Broadway, N. Y.

To Messrs. Tracy, Catlin & Hudson, attorneys for defendant.

18 At a special term of the supreme court of the State of New York for the second judicial district, held at the court-house, in the city of Brooklyn, Kings county, on the first day of May, 1882.

Present: Hon. J. O. Dykman, justice.

HENRY POTTS, JUNIOR, as Assignee of the Chester Tube and Iron Company, Plaintiff,
against
WILLIAM H. WALLACE, Defendant.

On reading and filing the affidavit of Henry W. Potts, verified April 24, 1882, with notice of this application and admission of service thereof of defendant's attorneys, and upon the pleadings and other papers herein, and after hearing Mr. Sidney Ward, attorney for plaintiff, and Mr. John Hudson, of counsel for defendant, on motion of said plaintiff's attorney—

It is ordered that Henry W. Potts, as assignee of the Chester Tube and Iron Company, be substituted as plaintiff in this action in the place and stead of Henry Potts, Junior, now deceased, and that this action proceed in the name of Henry W. Potts, as assignee as aforesaid, as plaintiff.

J. O. DYKMAN.

19 Endorsed: Order for substitution of plaintiff. Filed Dec. 16, 1882.

New York Supreme Court, County of Kings.

HENRY W. POTTS, as Assignee of the Chester Tube and Iron Company, Plaintiff,
against
WILLIAM H. WALLACE, Defendant.
Trial to be Had in the County of Kings.

The above named plaintiff, by this a supplemental complaint, respectfully shows to this court and alleges on information and belief as follows:

That this action was originally commenced by Henry Potts, Junior, as assignee of the Chester Tube and Iron Company, as plaintiff; that said Henry Potts, Junior, died on or about the 29th day of September, 1881; that this plaintiff was duly substituted as plaintiff herein (having succeeded to the rights of said Henry Potts,

Junior, as hereinafter alleged) by an order of this court duly granted at a special term thereof, held at the court-house, in the city of Brooklyn, on the first day of May, 1882.

20 That on or about the 13th day of December, 1877, the defendant and six other persons associated together for the purpose of forming a corporation in the State or Commonwealth of Pennsylvania under the provisions of an act or public and general law of assembly of Pennsylvania, approved April 29, 1874, entitled "An act to provide for incorporation and regulation of certain corporations" and the supplements thereto, and did duly form such corporation, as provided by said act and supplements, under the corporate name of "The Chester Tube and Iron Company," and that said corporation became fully organized on or about the fifth day of January, 1878, by a full compliance with said act and supplements.

That said corporation was formed for the purpose of the manufacture of iron or steel, or both, or of any other metal, or of any article of commerce from wood or metal or both; that the principal place where the business of said corporation was to be transacted was Chester, Delaware county, in the State of Pennsylvania; that the said corporation was to be perpetual; that the capital stock of said corporation was fixed at one hundred thousand dollars, divided into two thousand shares of the par value of fifty dollars each; that the whole amount of said capital stock was subscribed, and that the defendant subscribed for and agreed to take and pay for three hundred shares of said stock of the aggregate par value of fifteen thousand dollars.

21 That said defendant did not fulfill the terms of his said subscription, but neglected to pay to said corporation the amount of his said subscription or any portion thereof, and neglected to take and pay for the shares of said capital stock so subscribed for by him or any portion thereof.

That said corporation, "The Chester Tube and Iron Company," continued after its organization to transact the business authorized under its certificate of incorporation until on or about the fourteenth day of September, 1880, when the said corporation had become and was indebted to sundry persons, firms, and corporations in various sums of money; and thereupon, by its certain indenture of assignment dated on that day, duly executed by the authority and direction of its board of directors, under its corporate seal and in full compliance with law, it duly granted, assigned, bargained and sold, aliened, released, and confirmed to Henry Potts, Junior, all and singular its lands, tenements, and hereditaments, moneys, property, goods, chattels, estate, and effects, real and personal, in trust, nevertheless, and to the uses and purposes in said deed specified, said uses and purposes being in substance to sell and dispose of all the real estate thereby conveyed and pending such sale to collect the rents, issues, and profits thereof, and as to all the other property so assigned and transferred to take such possession thereof as the nature of the same would allow, and to sell and dispose of, assign, and transfer the same, and to demand, sue for, recover, and receive all and singular

the debts, moneys, and obligations owing to said corporation,
22 and after paying and discharging the expenses and charges incident to said trust to pay, appropriate, apply, and distribute the proceeds of said property and estate, real and personal, to and among the creditors of said corporation without preference or distinction, and in case any surplus should remain after the payment of said debts to return the surplus to said corporation; that in and by said deed said corporation gave to said Henry Potts, Junior, full power and authority to do all and every act and thing necessary and requisite to carry out the trusts thereby created and constituted, and appointed said Henry Potts, Junior, its true and lawful attorney irrevocable to ask, demand, sue for, levy, recover, and receive all sum and sums of money to it due and owing, and on receipt thereof to give acquittance or other sufficient discharges in the law; that said deed, as by the laws of said Commonwealth of Pennsylvania required, was duly recorded in the office for recording deeds, &c., in and for the county of Delaware, Pennsylvania, in Book Z No. 4, page 213, &c., on said 14th day of September, 1880; that said Henry Potts, Junior, accepted the trust created by said deed on the day of its date by writing endorsed thereon and signed by him and made and executed his bond as such assignee and trustee as required by law, with sufficient sureties, which bond, duly approved by the proper court, was filed in the office of the clerk of the court of common pleas in and for the county of Delaware, Pennsylvania, and that said Henry Potts, Junior, became and was the lawfully constituted assignee of all and singular the assets and property of said corporation and the owner of the same.

That as part of the debts and obligations due and owing to said corporation there came into the possession of said Henry Potts, Junior, under said deed the subscription of said defendant for said capital stock of such corporation hereinbefore stated and set forth; that said Henry Potts, Junior, on or about the 11th day of October, 1880, duly demanded from the said defendant the payment of the said subscription, to wit, the sum of fifteen thousand dollars, but that said defendant neglected and refused to pay the same and has not paid the same or any part thereof, but became and was indebted to said Henry Potts, Junior, as such assignee upon his said subscription in the sum of fifteen thousand dollars, with interest thereon from said eleventh day of October, 1880.

That said Henry Potts, Junior, died on or about the 29th day of September, 1881, during the pendency of this action; that on the 6th day of March, 1882, this plaintiff was duly appointed the assignee of the said The Chester Tube and Iron Company by the court of common pleas of the county of Delaware, in the State of Pennsylvania, which was a court of competent jurisdiction under the laws of said State and had full and lawful power and authority to make such appointment, and that this plaintiff had given such bonds as are required by law for the discharge of his duties
24 as such assignee, which bond has been duly approved by said court, and that this plaintiff has succeeded to all the rights of said Henry Potts, Junior, as such assignee, and has become

and is the lawfully constituted assignee of said The Chester Tube and Iron Company, and is now the holder and owner of said claim demand against the defendant, and there is now due and owing to him from said defendant said sum of $15,000 and interest thereon from the 11th day of October, 1880, upon said subscription to said capital stock.

Wherefore plaintiff demands judgment against said defendant for the sum of fifteen thousand dollars, with interest thereon from the eleventh day of October, 1880, with costs of this action.

SIDNEY WARD,
Plaintiff's Attorney, 120 *Broadway, New York City, N. Y.*

STATE OF NEW YORK, }
City and County of New York, } *ss*:

Sidney Ward, being duly sworn, says that he is the attorney for the plaintiff in the foregoing complaint named, and that said complaint is true to his own knowledge except as to the matters therein stated to be alleged on information and belief, and as to those matters he believes it to be true; that the grounds of his belief are that he has in his possession a certified copy of the certificate of incorporation of the Chester Tube and Iron Company re-
25 ferred to in said complaint; that from said certificate the said company appears to have been duly organized under the laws of Pennsylvania; that the remaining facts alleged in said complaint were stated to deponent by the said Henry Potts, Junior, personally or by letter, or appear from papers in deponent's possession and from letters and papers received by deponent since the death of said Henry Potts, Junior, and that deponent believes the statements so made by said Henry Potts, Junior, and appearing in said papers and letters to be true; that the reason this verification is made by deponent and not by plaintiff is that plaintiff is not within the county of Kings, where deponent resides, nor in the county of New York, where he has his office.

SIDNEY WARD.

Sworn to before me this 16th day of December, 1882.
WILLIAM J. CAMPBELL,
Notary Public, N. Y. County.

Endorsed: Supplemental complaint.

26 N. Y. Supreme Court, Kings County.

HENRY W. POTTS, as Assignee of the Chester Tube and Iron Company,
vs.
WILLIAM H. WALLACE.

The defendant, answering the supplemental complaint herein, respectfully shows to this court:

I. The defendant admits that the action was originally commenced by Henry Potts, Jr., as assignee of the Chester Tube and Iron Com-

pany, and that said Henry Potts, Jr., died on or about September 28th, 1881, but whether this plaintiff succeeded to the rights of said Henry Potts, Jr., or whether he was duly appointed the assignee of the Chester Tube and Iron Company, as alleged in the complaint, this defendant has no knowledge nor information sufficient to form a belief.

II. This defendant admits that he and six other persons associated themselves together for the purpose of forming a corporation in the State of Pennsylvania by the name of the Chester Tube and Iron Company, but whether said corporation was ever duly organized or not this defendant has no knowledge nor information sufficient to form a belief, and therefore leaves plaintiff to make such proof thereof as he may be advised.

27 III. The defendant admits that if said corporation was duly organized that it was formed for the purpose of the manufacture of boiler tubes of iron or steel, or both, or of any other metal, or of any other article of commerce, and that the principal place where the business was to be transacted was Chester, Delaware county, Pennsylvania; that the corporation was to be perpetual, and that the capital stock was fixed at one hundred thousand dollars, divided into two thousand shares of the par value of fifty dollars each, and that this defendant subscribed for three hundred shares of the stock, of the aggregate par value of fifteen thousand dollars; and this defendant alleges that he repeatedly offered to pay for and take up said three hundred shares of stock, but that said corporation refused to deliver said stocks to this defendant, but, on the contrary, notified him that they would not deliver or issue any stock whatever to him, and no stock ever was issued to this defendant.

IV. The defendant has no knowledge nor information sufficient to form a belief as to whether said alleged corporation ever sold, assigned, transferred, or set over unto said Henry Potts, Jr., in trust or otherwise, or had the power or legal authority so to do, all and singular its property, both real and personal, or whether said alleged deed of trust was ever recorded, as in said complaint alleged, or whether the said Henry Potts, Jr., accepted the trusts created by said alleged deed by writing endorsed thereon or otherwise,

28 or made or executed his bond, as required by law, with sufficient sureties, or whether said bond was duly approved by the proper court or was filed in the office of the clerk of the court of common pleas in and for the county of Delaware, Pennsylvania, or whether the said Henry Potts, Jr., had the power or was the lawfully constituted assignee of all and singular the assets and property of said corporation.

V. The defendant admits that the said Henry Potts, Jr., as assignee, made demand upon him for the payment of said subscription, and that defendant did not pay the same.

VI. The defendant denies that he was or is indebted to Henry Potts, Jr., as such assignee or said plaintiff, in the sum of fifteen thousand dollars or in any sum whatever.

VII. The defendant has no knowledge nor information sufficient

to form a belief as to the statements contained in said complaint not hereinbefore admitted or denied.

The defendant, further answering said complaint and by way of counter-claim, alleges—

That said corporation, the Chester Tube and Iron Company, was indebted to this defendant and William Bispham, as copartners composing the firm of William H. Wallace & Co., in the sum of seven thousand eight hundred and ninety-two and $\frac{11}{100}$ dollars, with interest thereon from September 4th, 1880, for that said corporation employed said firm of William H. Wallace & Co. as their agents to sell their goods in the name of the firm of William H. Wal-
29 lace, he undertaking and agreeing to fill all orders and contracts which said firm might make or accept, and that in pursuance thereof the said firm did make and enter into contracts with various parties for the sale and delivery of a large quantity of goods, and that the said iron company failed to fill the orders and make and deliver said goods accepted by them and as requested and ordered by said firm, and that in consequence thereof the said firm of William H. Wallace & Co. became liable and had to go into the market and fill said orders at an advanced price, whereby they had to pay the difference between what the said iron company had agreed to make and deliver said goods for and what it cost them in the open market, to wit, the said sum of seven thousand eight hundred and ninety-two and $\frac{11}{100}$ dollars.

That said firm of William H. Wallace & Co. duly assigned, transferred, and set over unto this defendant the said claim against said company as aforesaid, and this defendant is now the lawful owner and holder thereof for value, and that no part thereof has been paid.

Wherefore this defendant demands judgment against the plaintiff for the sum of seven thousand eight hundred and ninety-two and $\frac{11}{100}$ dollars, with interest from September 4th, 1880, besides costs.

TRACY, CATLIN & HUDSON,
Defendant's Att'ys.

KINGS COUNTY, *ss:*

30 William H. Wallace, the above-named defendant, being duly sworn, says that the foregoing answer is true of his own knowledge except as to the matters therein stated to be alleged on information and belief, and as to those matters he believes it to be true.

WM. H. WALLACE.

Sworn to before me this 28th day of February, 1883.

CHAS. H. REQUA,
Notary Public, Kings Co.

Endorsed: Answer. Filed June 30, 1883.

31 New York Supreme Court, County of Kings.

HENRY W. POTTS, as Assignee of the Chester Tube and Iron Company, Plaintiff,
against
WILLIAM H. WALLACE, Defendant.

The plaintiff, by Sidney Ward, his attorney, and alleging the matters herein on information and belief, for a reply to so much of the answer of the defendant to the supplemental complaint herein as is alleged by way of counter-claim, denies that the said plaintiff has any knowledge or information sufficient to form a belief as to whether the said corporation, the Chester Tube and Iron Company, was indebted to said defendant and William H. Bispham, as partners composing the firm of William H. Wallace & Co., in the sum of $7,892.11, with interest from September 4, 1880, or in any sum whatever, upon any employment or agreement, as alleged in said answer or otherwise, or whether said Chester Tube and Iron Company agreed to fill all orders and contracts which said firm might make or accept, or whether said firm made or entered into contracts with various parties or any parties for the sale and delivery of a large quantity of goods or any quantity of goods, as
32 alleged in said answer, which the said Chester Tube and Iron Company was bound to fill under any agreement with said firm, or whether said iron company failed to fill orders and make and deliver goods which it was bound to fill or make or deliver under any agreement made by said firm with other parties, or whether said firm became liable to or had to go into the market and fill any such orders at an advanced price in consequence of the failure of said company to fill any such orders or deliver any such goods, or whether they had to pay any difference between what said iron company had agreed to make and deliver said goods for and what said goods would cost in the open market, as alleged in said answer, or whether by reason of any failure of said iron company to fill any such order or deliver any such goods said firm of William H. Wallace & Co. had to pay or did pay the sum of $7,892.11 or any other sum, or whether said William H. Wallace & Co. assigned to said defendant said alleged claim against said iron company or not, or whether the said defendant is the owner of said alleged claim, and leave the defendant to make such proof of said allegations as he shall be advised to make, insisting that the matters alleged in said answer by way of counter-claim do not constitute any defence to the plaintiff's claim in this action or any counter-claim herein.

SIDNEY WARD,
Plaintiff's Attorney, 120 *Broadway, New York City.*

33 STATE OF NEW YORK, } ss:
City and County of New York, }

Sidney Ward, being duly sworn, says that he is the plaintiff's attorney in the foregoing-entitled action, and that the foregoing reply

is true to his knowledge except as to the matters therein stated to be alleged on information and belief, and as to those matters he believes it to be true.

That the grounds of his belief of the matters stated in said reply are statements made to him by Henry Potts, Junior, now deceased; which statements he believes to be true and which statements are embodied in said reply.

That the reason this verification is not made by the plaintiff — by deponent is that said plaintiff is absent from the city and county of New York, where deponent has his office, and from the county of Kings, where he resides.

SIDNEY WARD.

Sworn to before me this 23d day of March, 1883.

WILLIAM J. CAMPBELL,
Notary Public (84), *New York City and County.*

Endorsed: Reply. Filed June 30, 1883.

34 New York Supreme Court, County of Kings.

HENRY W. POTTS, as Assignee of the Chester Tube and Iron Company, Plaintiff,
against
WILLIAM H. WALLACE, Defendant.

To the supreme court of the State of New York:

The petition of Henry W. Potts, the plaintiff in the foregoing-entitled action, respectfully shows—

That your petitioner is the assignee of the Chester Tube and Iron Company, a corporation created by and under the laws of the State of Pennsylvania.

That the above-entitled action was commenced in the name of and by Henry Potts, Junior, who was the assignee of the said The Chester Tube and Iron Company, as such assignee as plaintiff, and issue was joined in said action, as your petioner is informed and believes, on the 23d day of August, 1881.

That before the first term at which said cause could have been tried, to wit, the October term, 1881, and on the 29th day of September, 1881, the said Henry Potts, Junior, died, said action not having been tried.

35 That your petitioner was thereafter duly appointed and constituted the assignee of said company and was substituted as plaintiff in said action by the order of this court in the place of said Henry Potts, Junior, after his decease.

That supplemental pleadings in this action have been made and served by the respective parties, as by reference thereto will more fully appear, and that the issue in this action on the pleadings, as your petitioner is informed and believes, was joined by the service of the plaintiff's reply on the 23rd day of March, 1883.

That this action is an action at law and was commenced and is

now pending in the supreme court of the State of New York; that the present May term of the circuit court of Kings county (to wit, the term which commenced on the third Monday of May, 1883) is the term at which this action could first be tried, and that the same has not been tried nor reached for trial, and this petition is presented before the trial thereof, and that the matter in dispute in this action exceeds the sum of five hundred dollars, exclusive of costs (the claim of the plaintiff herein being for fifteen thousand dollars and interest, besides costs).

That the said Henry Potts, Junior, was at the time of the commencement of this action and prior thereto, and from that time until the time of his death, a citizen and resident of the State of Pennsylvania and was not a citizen or resident of the State
36 of New York; that your petitioner was at the time of the commencement of this action a resident of the State of Pennsylvania and has — for some time past and now is a citizen and resident of the State of West Virginia and not of the State of New York, and that the defendant, William H. Wallace, was at the time of the commencement of this action and ever since then has been and still is a citizen and resident of the State of New York; that there is a controversy in this action or suit between citizens of different States, to wit, between your petitioner, a citizen of the State of West Virginia, and said defendant, a citizen of the State of New York, and that there are no other parties to this action.

That your petitioner offers herewith a bond, with good and sufficient surety, for his entering in the circuit court of the United States for the eastern district of New York, to be held in the district in which the same is pending, on the first day of its next session, a copy of the record in this action, and for paying all costs that may be awarded by said circuit court if said court shall hold that this action was wrongfully or improperly removed thereto, which bond is herewith filed.

Your petitioner therefore prays this honorable court to proceed no further except to make the order of removal required by law and to accept the said bond and surety and to cause the record herein to be removed into said circuit court of the United States for the eastern district of New York, and that your petitioner may be
37 allowed the time required by law for filing a copy of the record herein in said court; and your petitioner will ever pray, &c.

Dated June 18, 1883.

SIDNEY WARD,
Attorney for Petitioner, 120 *Broadway, New York City, N. Y.*

STATE OF WEST VIRGINIA, }
County of Jefferson, } *ss:*

Henry W. Potts, being duly affirmed, says that he is the petitioner in the foregoing petition named, and that the said petition is true to his own knowledge except as to the matters therein alleged to be stated on information and belief, and as to those matters he believes it to be true.

HENRY W. POTTS.

Subscribed and affirmed before me this 18th day of June, 1883.

JOHN PORTERFIELD,
[SEAL.] *Notary Public.*

Clerk's Office of the County Court.

STATE OF WEST VIRGINIA, *County of Jefferson,* } *To wit:*

38 I, Thomas A. Moore, clerk of said court, hereby certify that John Porterfield, Esq., who has this day given the foregoing certificate, is a notary public of said county, duly commissioned and qualified, authorized by law to administer oaths and affirmations, and that full faith and credit are due to all his official acts as such.

Given under my hand and the seal of said court this 18th day of June, A. D. 1883.

[SEAL.] THOMAS A. MOORE,
Clerk of Jefferson County Court, West Virginia.

STATE OF WEST VIRGINIA, *County of Jefferson,* } *ss:*

I, Thomas A. Moore, clerk of the county court of said county of Jefferson, the same being a court of record, do hereby certify that John Porterfield, whose name is subscribed to the foregoing affidavit and therein written, was at the time of the taking of said affidavit a notary public in and for the said county of Jefferson, dwelling in said county, commissioned and sworn and duly authorized to take the same, and, further, that I am well acquainted with the handwriting of such notary, and verily believe that the signature to the jurat of the said affidavit is genuine.

In testimony whereof I have hereunto set my hand and affixed the seal of the said court the 20th day of June, 1883.

[SEAL.] THOMAS A. MOORE,
39 *Clerk of Jefferson County Court, State of West Virginia.*

COUNTY OF KINGS, *ss:*

Sidney Ward, the attorney for the petitioner in the within petition named, being duly sworn, says that no previous application has been made to the supreme court or any justice thereof for the order prayed for in said petition.

SIDNEY WARD.

Sworn to before me this 22nd day of June, 1883.

DAN'L M. TREDWELL,
Notary Public, Kings Co.

Endorsed: Petition for removal. Filed June 22, 1883.

Know all men by these presents that we, Henry W. Potts, of Shepherdstown, Jefferson county, State of West Virginia, as principal, and Charles A. Sterling, of the city, county, and State of New York, as surety, are held and firmly bound unto William H. Wal-

lace in the penal sum of one thousand dollars; for the payment whereof unto the said William H. Wallace, his executors, administrators, and assigns, well and truly to be made, we bind ourselves and our heirs, executors, and administrators, jointly and severally, firmly by these presents.

40 Sealed with our seals. Dated this ninth day of June, A. D. 1883.

Whereas the said Henry W. Potts has petitioned or is about to petition the supreme court of the State of New York in and for the second judicial district for the removal of a certain cause therein pending in the county of Kings, wherein the said Henry W. Potts, as assignee of the Chester Tube and Iron Company, is plaintiff and the said William H. Wallace is defendant, to the circuit court of the United States of America for the eastern district of New York:

Now, therefore, the condition of the said obligation is such that if the said Henry W. Potts, assignee as aforesaid, as such plaintiff, shall enter into the circuit court of the United States on the first day of its next session a copy of the record in said cause and shall well and truly pay all costs that may be awarded by said circuit court of the United States if said court shall hold that said cause or action was wrongfully or improperly removed thereto, then this obligation to be void; otherwise to remain in full force and virtue.

In witness whereof we have hereunto set our hands and seals the day and year first above written.

HENRY W. POTTS. [SEAL.]
CHAS. A. STERLING. [SEAL.]

Sealed and delivered in the presence of—
JNO. PORTERFIELD.
SIDNEY WARD.

41 STATE OF WEST VIRGINIA, } *ss:*
County of Jefferson, }

On this 18th day of June, 1883, before me personally came Henry W. Potts, to me personally known and known to me to be the individual described in and who executed the foregoing instrument in writing, and acknowledged that he executed the same.

JOHN PORTERFIELD,
[SEAL.] *Notary Public.*

STATE OF WEST VIRGINIA, } *To wit:*
County of Jefferson, }

CLERK'S OFFICE OF THE COUNTY COURT.

I, Thomas A. Moore, clerk of said court, hereby certify that John Porterfield, who has this day given the foregoing certificate of acknowledgement, is a notary public of said county, duly commissioned and qualified, authorized by law to take and certify acknowledgements of deeds and other writings, and that full faith and credit are due to all his official acts as such.

Given under my hand and the seal of said court this 18th day of June, A. D. 1883.

THOMAS A. MOORE,
[SEAL.] *Clerk of Jefferson County Court, West Virginia.*

42 STATE OF WEST VIRGINIA, *County of Jefferson,* } ss:

I, Thomas A. Moore, clerk of the county court for the said county of Jefferson, the same being a court of record, do hereby certify that John Porterfield, whose name is subscribed to the certificate of the proof or acknowledgment of the foregoing instrument and thereon written, was at the time of taking such proof a notary public in and for the said county of Jefferson, dwelling in the said county, commissioned and sworn and duly authorized to take the same, and, further, that I am well acquainted with the handwriting of such notary and verily believe that the signature to the said certificate of proof or acknowledgement is genuine.

In testimony whereof I have hereumto set my hand and affixed the seal of the said court the 20th day of June, 1883.

[SEAL.] THOMAS A. MOORE,
Clerk of Jefferson County Court, State of West Virginia.

STATE OF NEW YORK, *City and County of New York,* } ss:

Charles A. Sterling, being duly sworn, says that he is a resident freeholder in the State of New York and resides at No. 136 West 21st street, in the city of New York, and is worth the sum of
43 five thousand dollars over and above all debts or liabilities which he owes or has incurred and exclusive of property exempt from levy and sale on execution, and that he is the surety named in the foregoing undertaking.

CHAS. A. STERLING.

Sworn to before me this 22nd day of June, 1883.

WILLIAM J. CAMPBELL,
Notary Public, New York City and County.

STATE OF NEW YORK, *County of Kings,* } ss:

On this 22nd day of June, 1883, before me personally came Sidney Ward, the subscribing witness to the foregoing instrument, to me personally known, who, being by me duly sworn, did depose and say that he resides in the city of Brooklyn, N. Y.; that he knew Charles A. Sterling, one of the individuals described in and who executed the said instrument; that he saw said Sterling sign and execute the same, and that he thereupon signed his name thereto as a subscribing witness to the execution thereof by said Sterling.

DAN'L M. TREDWELL,
Notary Public, Kings Co.

Endorsed: Bond on petition for removal of action. Filed June 22, 1883.

44 At a special term of the supreme court of the State of New York held at the county court-house, in the city of Brooklyn, Kings county, on the 22nd day of June, 1883.

Present: Hon. Edgar M. Cullen, justice.

HENRY W. POTTS, as Assignee of the Chester Tube and Iron Company, Plaintiff,
against
WILLIAM H. WALLACE, Defendant.

On reading and filing the petition of the above-named plaintiff for the removal of this action to the circuit court of the United States for the eastern district of New York, this day presented and filed, and the surety bond therewith presented, and on motion of Mr. Sidney Ward, appearing as attorney for the plaintiff—

It is ordered that the said bond, surety, and petition be, and the same hereby are, accepted.

Enter.

E. M. C.

Endorsed: Order of removal of action to U. S. circuit court. Filed June 22, 1888.

45 STATE OF NEW YORK, *County of Kings*, } ss:

I, Rodney Thursby, clerk of the county of Kings and clerk of the supreme court of the State of New York in and for said county (said court being a court of record), do hereby certify that I have compared the annexed with the original summons, complaint, answer, reply, affidavit, and order substituting new plaintiff, supplemental complaint, answer, reply, petition, bond, and order removing cause to U. S. circuit court filed in my office, and that the same are true transcripts thereof and of the whole of such originals and of the whole of the record.

In testimony whereof I have hereunto set my hand and [L. S.] affixed the seal of said county and court this 3d day of July, 1883.

RODNEY THURSBY, *Clerk.*

46 At a stated term of the circuit court of the United States of America for the eastern district of New York, in the second judicial circuit, held at the United States court-rooms, in the city of Brooklyn, on the 8th day of May, in the year of our Lord one thousand eight hundred and eighty-eight.

Present: The Honorable E. Henry Lacombe, circuit judge.

HENRY W. POTTS, Assignee, &c.,
vs.
WILLIAM H. WALLACE.

Cause called. Hearing ordered.

Appearances: S. Ward, Esq., for plaintiff; B. F. Tracy, Esq., for defendant.

Jury drawn as follows:

* * * * * * *

Jury sworn.

Hearing suspended to May 9th, 1888.

MAY 9TH, 1888.

Hearing resumed. Same appearances.

* * * * * * *

Mr. Tracy moves to direct verdict for plaintiff.

Mr. Ward opposed.

* * * * * * *

47 Motion of Mr. Tracy granted.

Verdict for defendant.

Mr. Ward moves for stay of 60 days to prepare a case and exceptions. Motion granted.

Mr. Ward moves for a new trial on the minutes. Motion denied. Exception.

A true extract from the minutes.

B. LINCOLN BENEDICT, *Clerk.*

48 At the May regular term of the circuit court of the United States for the eastern district of New York held on the 9th day of May, 1888.

Hon. E. Henry Lacombe, circuit judge, presiding.

HENRY W. POTTS, as Assignee of the Chester Tube and Iron Company, Plaintiff,
against
WILLIAM H. WALLACE, Defendant.

The above-entitled action having been tried before the judge above named and a jury at this May term of this court, and a verdict having been rendered in favor of the defendant against the plaintiff on the 9th day of May, 1888, and the plaintiff having given notice of its intention to make a motion to set aside the said verdict and for a new trial herein, and having obtained leave therefor, it is now, on motion of Sidney Ward, plaintiff's attorney—

Ordered that this said term be continued sixty days for the purposes of making said motion and the time of the defendant to prepare and serve its proposed case and exceptions is hereby extended sixty days from date, and leave is hereby granted to turn the same
49 when settled into a bill of exceptions; and it is further ordered that all proceedings on the part of the plaintiff here be stayed until the hearing and decision of such motion.

E. HENRY LACOMBE.

Enter *nunc pro tunc* as of date May 9th, 1888.

E. H. LACOMBE.

Endorsed: Order extending term. Filed July 5th, 1888, as of May 9th, 1888.

Circuit Court of the United States for the Eastern District of New York.

HENRY W. POTTS, as Assignee of the Chester Tube & Iron Company, Plaintiff,
against
WILLIAM H. WALLACE, Defendant.
} Bill of Exceptions.

This cause came on to be tried at a regular term of the circuit court of the United States for the eastern district of New York on the 8th day of May, 1888.

Present: Hon. E. Henry Lacombe, circuit judge, presiding.

Mr. Sidney Ward appeared as counsel for the plaintiff, and Hon. Benjamin F. Tracy appeared as counsel for the defendant.

A jury having been empannelled, the plaintiff, to maintain his cause of action, offered in evidence Purdon's Annual Digest, being a supplement to Brightley's Digest, pages 1839, 1840, and 1841, showing the statutes of the State of Pennsylvania authorizing the formation of corporations for business purposes in the State of Pennsylvania.

The plaintiff then offered in evidence an exemplified copy of the charter of the Chester Tube & Iron Company, bearing date
51 the 13th day of December, 1877, in and by which the incorporators associated themselves together under the provisions of the act of the assembly of Pennsylvania, approved April 29th, 1874, entitled "An act to provide for incorporation and regulation of certain corporations," and the supplements thereto, which charter is signed by Augustus B. Wood, William S. McManus, William H. Wallace, John Shotwell, Patrick Reilly, Theodore F. Jenkins, and James Archer.

The directors named in the charter for the first year are William S. McManus, Augustus B. Wood, William H. Wallace, Patrick Reilly, and John Shotwell.

In and by this charter the defendant, William H. Wallace, subscribed for 300 shares, of the par value of $50 each.

The said charter was approved by J. F. Hartranft, governor, January 5th, 1878, with the direction that letters patent be issued according to law. Accompanying this exhibit is a certified copy of the letters patent, bearing date the 5th day of January, 1878.

The business of the corporation, as stated in its charter, was for the manufacturing of iron or steel, or both, or of any other metal, or of any article of commerce from wood or metal, or both. The principal place of business of the corporation is stated to be at Chesbon Delaware county, Pennsylvania.

men aintiff's counsel offers in evidence an exemplified copy of the cond d of the charter of the Chester Tube & Iron Company, recorded

in the office of the recorder of deeds of Delaware county, Pennsylvania, recorded April 15th, 1878, in Deed Book "O" No. 4, page 400, &c.

52 Plaintiff's counsel also offered in evidence the certificate of the secretary of the Commonwealth of Pennsylvania, showing that the certificate of registration of the Chester Tube & Iron Company was filed in the office of the secretary on the 5th day of January, 1878.

WILLIAM S. MCMANUS, being sworn and examined as a witness for the plaintiff, testified as follows:

I was president of the Chester Tube & Iron Company, and was one of its incorporators. I reside at South Chester, Pennsylvania, in Delaware county. I was one of the persons who formed the Chester Tube & Iron Company. I know William H. Wallace, one of the defendants, and he was one of the directors of the company, and also one of the incorporators. He commenced to be a director of the company from its incorporation, and continued to act as such until some time in July or August, 1880, I think. The company got into difficulties in 1880. The first intimation of these difficulties was made to me in the month of June of that year. At that time it was practically bankrupt.

Plaintiff's counsel shows the witness what purports to be the minutes of the Chester Tube & Iron Company.

The witness says this is the book of minutes of that company.

Plaintiff's counsel calls the witness' attention to the minutes of the meeting of the board of directors held on or about the 3rd day of August, 1884. This meeting was held in the city of New York.

Plaintiff's counsel states that the statute of Pennsylvania
53 provides (one already offered in evidence) that all meetings may be held outside of the State of Pennsylvania except for the election of stockholders.

Counsel for defendant objected to the testimony in regard to this meeting on the ground that the corporation in question is a Pennsylvania corporation and the proceedings offered in evidence are what purports to be proceedings held in New York. Objection overruled. Counsel for defendant excepts.

Plaintiff's counsel offers in evidence the following resolution adopted at the meeting of the board on the 3rd August, 1880, as follows:

"Whereas it has become apparent that in order to enable this company to meet its liabilities that some indulgence on the part of its creditors is necessary:

Therefore resolved, That the president is authorized to negotiate for and effect an extension of the claims against the company upon such terms as he may deem most likely to make it meet its indebtedness, and in the event of his failure to accomplish such extens[illegible] the president is authorized to execute, under the corporate seal, [illegible] his attestation, a deed of general assignment for all the estate

property of the company for the benefits of its creditors *pro rata* and without preference."

Counsel for defendant objects to the resolution and offered to show that the resolution was rescinded at a subsequent meeting of the trustees.

Q. What was done under this resolution?

A. Under this resolution a meeting of the creditors was
54 called, and the majority authorized me to appoint a trustee, which I did.

Q. Who did you name?

A. I named Henry Potts, Jr.

(By the COURT:)

Q. Did you make an assignment?

A. I made an assignment; yes, sir; and, acting under a request that came from each of the creditors, I may say $\frac{4}{5}$ asked me to name Mr. Potts as the trustee.

Plaintiff's counsel then offers in evidence an exemplified copy of the deed of assignment made by the Chester Tube & Iron Company, by its president, William S. McManus, under its seal, to Henry Potts, Jr., dated September 14th, 1880, which transfers and conveys to Henry Potts, Jr., as assignee, all the property and estate of the company of every description in trust to sell and dispose of the same and to collect all claims of the corporation, conduct all steps necessary for the purpose of converting the assets into cash, and to divide the same without preference among the creditors of the corporation, with further provision that should there be any surplus after paying the debts that the same should be returned to the corporation. This assignment is recorded in the recorder's office of Delaware county, Pennsylvania, September 14th, 1880, in Deed Book Z No. 4, page 213, &c.

Counsel for defendant objected to the receipt of this document on the ground that the president was not authorized by the directors or stockholders of the corporation to make the assignment; that the assignment was void for want of authority. Objection overruled and paper received in evidence.

55 Plaintiff's counsel then offers in evidence the provisions of the statutes of Pennsylvania in regard to assignments, on pages 90 to 94 of the supplement of Purdon's Brightley's Digest, and on pages 1414 to 1420, giving the jurisdiction of the courts in regard to general assignments, by which it appears that it is vested in the court of common pleas in the county where the assignment is made; and this statute provides that the assignee of any corporation shall file a bond, to be approved by the court of common pleas.

Plaintiff's counsel offers in evidence an exemplified copy of the bond of Henry Potts, Jr., as assignee, under the deed of the assignment which is introduced, bearing date the 20th of October, 1880, conditioned for the faithful performance by Mr. Potts of his duties

as such assignee, said bond being in the penalty of $191,000, endorsed, filed October 21st, 1880, approved by the court.

Q. State what Mr. Potts did in connection with the property of the corporation, so far as you know—whether he took possession of it.

A. Mr. Potts took possession of the property on the afternoon of the day I made the assignment. Mr. Henry Potts died in September, 1881; I think about that time.

56 Plaintiff's counsel offers in evidence section 23, on page 1418, Brightley's Digest, by which provision is made for the appointment of a trustee by the court in case of the death of the assignee.

Plaintiff's counsel offers in evidence the petition of George H. Potts to the Hon. Thomas H. Clayton, presiding judge of the court of common pleas of Delaware county. Petition is verified March 6th, 1882, and recites the appointment of Henry Potts, Jr.; that said Henry Potts, Jr., assumed the trust and proceeded with the execution of the same so far as to file an account, which account was affirmed by the court; that the said Henry Potts, Jr., has died, leaving the trust vacant, and petitioner applies for the appointment of an assignee to fill the place of the said Henry Potts, Jr., as follows:

This petition was filed March 6th, 1882, and an order made appointing Henry W. Potts, the plaintiff herein, assignee to fill the vacancy occasioned by the death of Henry Potts, Jr., he to give the bond in the usual form, with Joseph D. Potts and George H. Potts as sureties, in the sum of $44,000.

Plaintiff's counsel also offers in evidence exemplified copy of the bond of Henry W. Potts, Jr., signed by Joseph D. Potts and George H. Potts as sureties for Henry W. Potts, assignee. Bond filed March 6th, 1882.

Plaintiff's counsel then offers in evidence page 26 of Purdon's Digest, under the title, Jurisdiction of the court of common pleas, under the article of "The Judiciary," showing the jurisdic-
57 tion of the court of common pleas over the matter of assignments by corporations and its general powers.

On his cross-examination the witness testified as follows:

Counsel for defendant offered to read the proceedings of the meeting of the stockholders and also of the board of directors on August 20th, and also the record of the proceedings of the board of directors on September 16th.

This testimony was objected to by the counsel for the plaintiff as being immaterial. The minutes are received, subject to the objection, and will be found later.

LAWRENCE A. TUCKER, being sworn as a witness for the plaintiff, testified as follows on his direct examination:

I reside at South Chester, Pennsylvania. I was employed by the Chester Tube & Iron Company as clerk, at Chester. The books of account of the company were kept at Chester towards the conclusion of the affairs of the company. I know the financial condition

of the company in the summer of 1880. It stopped paying its notes in August, 1880.

Q. Was there any statement of its assets at that time?

A. There was a statement which I made up of its assets and liabilities in August, 1880, for the purpose of submitting it to its creditors, in which it showed, to the best of my knowledge, about $30,000 more debts than assets. So far as I know, this was a correct statement of its condition. This statement showed the assets at their nominal value and their debts as they actually existed so
58 far as I know. I know what property the company had at that time. Its property consisted of a lease and of machinery, of iron, of the debts due to the company, and of cash. All were estimated to be worth $250,000. The company had no real estate. At that time the market value of the property was about $250,000 in round numbers. The indebtedness of the company was $270,000 to $275,000.

Counsel for the defendant consents to take the statement of the witness, without contradicting it, that the assets of the company appeared to be $250,000 and the liabilities $270,000 to $275,000.

Mr. Potts took possession of the property, as assignee, and continued to manage it up to his death.

The counsel for the plaintiff states to the court that the answer admits a demand of the assignee on the defendant for his subscription for the capital stock.

Counsel for plaintiff states the claim of plaintiff to be for $15,000, with interest from October 11, 1880, the date of demand.

Plaintiff rests.

Counsel for defendant opened case for defence.

Counsel for the defendant called as witness JOHN SHOTWELL, who, being duly sworn, testified as follows:

I reside in New York city. I was the treasurer and secretary of the Chester Tube & Iron Company and had filled those positions from the time of its commencement to its failure—during its entire existence. William McManus was president, and he and I filled the three executive offices of president and secretary and treasurer. The office of the president was in South Chester. The di-
59 rectors' meetings were held in New York city and the stockholders' meetings in South Chester. My office as treasurer and secretary was in New York city. I attended the meeting of the officers of the corporation in New York on August 20, 1880; also the meeting of the stockholders on the same day. Mr. McManus was present at the first meeting, that of the directors. I don't remember where the second meeting was held.

Referring to minutes of the company, the witness states that Mr. McManus was present at both these meetings, which were held in New York. Our stockholders were also directors of the company. At the commencement of the organization there was one stockholder who was not a director; this was Mr. Jenkins. At this meet-

ing of August 20th there was some stock that stood in the name of William H. Wallace. He was not a director at that meeting; I mean the last meeting—that is, the meeting of the 20th, and, I think, also of the 12th of August. There were never any certificates of stock issued to the stockholders.

Objected to by plaintiff's counsel as immaterial, irrelevant, and incompet*ible*. Objection overruled. Plaintiff excepts.

All there was in regard to the stock was subscriptions for the stock.

(By counsel for the defendant:)

Q. How did that stock stand at the time of the meetings on the 12th and 20th of August?

A. I don't remember exactly, it is so many years ago. I think about $43,000 stood in the name of Mr. Wood; about $10,000 in my own name.

Q. (Counsel showing witness a book.) Refresh your memory from this memorandum now handed you. You are able to state how the stock stood originally; tell us how it was subscribed for and in whose name.

60

A. The stock was originally subscribed in the name of A. B. Wood, 1,000 shares; William S. McManus, 1 share; William H. Wallace, 300 shares; John Shotwell, 510 shares; Patrick Reilly, 100 shares; Theodore F. Jenkins, 80 shares, and James Archer, 9 shares.

The directors named in the articles of association to manage the affairs of the company were A. B. Wood, William S. McManus, William H. Wallace, John Shotwell, and Patrick Reilly.

There were two stockholders who were not directors—Theodore Jenkins and James Archer. Jenkins held 80 and Archer 9 shares. These two were not directors; all the rest of the stockholders were directors.

Q. When did Mr. Wallace cease to be a director?

A. I think, as near as I can remember, in June or July, 1880; I have forgotten the exact month.

Referring to the minute book, witness says it was the 6th of July, 1880.

F. C. Shotwell was elected to fill Mr. Wallace's place. He held one share. F. C. Shotwell was to take Mr. Wallace's place. There were two resignations from the board—one was Mr. Reilly and the other Mr. Wallace. D. F. Houston took one and F. C. Shotwell the other. Mr. Houston had two shares. On the 12th of August there had been some changes from the original subscription—two shares stood in Mr. Houston's name and one share in Shotwell's. These were transferred from William S. McManus. Before the 12th of August there had been transfers of the stock—I think in June. Mr. McManus held at a date in June 550 shares. Transfers are made in my handwriting, but without date. I can't remember when they were made, but as near as I can remember they were

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made in June. These transfers were made by verbal instructions. There was no written certificate issued to show subscriptions.

Nothing except the one original certificate of incorporation. The subscription was in the charter; it was the subscription made to file with the charter. The different transfers that were made were made on verbal instructions from the stockholders making the transfers. On the 12th of August the stock stood as follows: A. B. Wood, 850 shares; William H. Wallace, 300 shares; William S. McManus, 547 shares; John Shotwell, 200 shares; Patrick Reilly, 100 shares; D. F. Houston, 2 shares; F. C. Shotwell, 1 share.

At the meeting of the directors on the 12th of August there were present William S. McManus, John Shotwell, and A. B. Wood. They represented 1,597 shares of the stock. There were 20,000 in all. These persons constituted a majority of the board of directors. This meeting also composed of that board of directors was composed of ¾ of the owners of the stock. On the 20th of August the minutes simply stated that a majority of the stockholders were present. At the meeting on the 20th of August there were present William S. McManus, A. B. Wood, John Shotwell, and D. F. Houston; they represented ¾ of the stock and four out of five of the board of
62 directors and included the three executive officers; president, secretary, and treasurer were present, Mr. McManus being president and I being secretary and treasurer.

Defendant's counsel offers in evidence the proceedings of the two meetings of August 12th and August 20th.

Counsel for plaintiff objected to the reception of these minutes for the reason that there was no action taken at these meetings which in any way affects the meeting of the 3rd of August at which the resolution was adopted authorizing or directing the president to execute the assignment. Objections overruled, and counsel for plaintiff excepts.

Counsel for defendant also offered in evidence minutes of meeting of September 16, 1880. Objected to by plaintiff's counsel as incompetent because this meeting was held after the making of the assignment under resolution of August 3, 1880. Objection overruled. Plaintiff excepts.

"A meeting of board of directors held this third day of August, 1880, at the office of the company in the city of New York, all directors present.

The following resolution was presented and adopted:

Whereas it has become apparent that in order to enable this company to meet its liabilities that some indulgence on the part of its creditors is necessary:

Therefore resolved, That the president is authorized to negotiate for and effect an extension of the claims against the company upon such terms as he may deem most likely to make it meet its indebtedness, and in the event of his failing to accomplish such ex-
63 tension the president is authorized to execute, under the corporate seal, with his attestation, a deed of general assignment

for all the estate and property of the company for the benefit of its creditors *pro rata* and without preference.

(S'g'd) JOHN SHOTWELL, *Sec't'y.*"

The COURT: What is the date of the assignment?

Mr. TRACY: September 14; then comes the meeting of August 12th:

"A special meeting of the stockholders of the Chester Tube and Iron Company held in the city of New York Aug. 12th, 1880—W. S. McManus in chair.

Present: W. S. McManus, A. B. Wood, John Shotwell.

The president presented his report of his conference with Potts Bros. Iron Company, Limited, stating that they would agree to extend the time of payment of our notes to them, provided we issued and executed a second mortgage to them to the amount of our indebtedness to them, amounting to about one hundred thousand dollars. After considering the proposition it was not considered expedient to execute a mortgage for such an amount, as it would totally destroy the credit of the company, and the proposition was therefore rejected.

(S'g'd) JOHN SHOTWELL, *Sec't'y.*

Special meeting of the stockholders of the Chester Tube & Iron Company held in the city of New York August 20th, 1880—W. S. McManus in the chair.

The minutes of former meeting being read and approved, the statement of the affairs of the company *were* submitted, showing
64 a total indebtedness of $278,183.79 and assets of $248,731.71.

The president stated that he had called a meeting of the creditors of the company to take place at South Chester yesterday, and that said meeting had been attended by the principal creditors, and that the affairs of the company had been discussed; that he had made a proposition looking to an extension of the company's indebtedness, and that the meeting had adjourned finally without coming to any conclusion or offering any terms.

A. B. Wood presented a statement of his acc., amount due him as trustee of John E. and Mary D. Browning, of New York, amounting to $11,210, due on July 4th, 1880, and loaned to the company in cash; also for $17,260 for cash loaned by him and accommodation note of the company upon which he is liable as endorser.

After discussion the following was presented and adopted:

Whereas it appears that A. B. Wood, as trustee, has loaned the company trust funds in his possession and has further become liable individually as endorser on accommodation paper: Therefore,

Resolved, That said indebtedness being of an extraordinary and confidential character, it has higher claims for settlement than ordinary business debts. It was considered that a bond and mortgage due in six months on the leasehold and machinery for the amount of the trust fund so stated above shall be executed to A. B. Wood, as trustee, with interest from the 4th July, 1880, same to be secured to

the mortgage already thereon. A. B. Wood further proposes
65 to purchase from this company all their interest in their leasehold, machinery, fixtures, and tools on the premises in South Chester, and to take an assignment thereof to himself individually in payment of $12,260 of the moneys due him individually by this company. After consideration it was decided to accept this proposition.

The following resolution was unanimously adopted:

Resolved, That the president, directors, and officers of this company are hereby authorized and directed to have prepared andduly executed under its corporate seal a bond and mortgage to A. B. Wood, as trustee, an assignment of lease to A. B. Wood, and any other instrument that they may deem necessary and expedient in such form as in the opinion of such officers shall be most efficient, said mortgage to grant, include, and cover all their leasehold, estate *terra*, and interests of the company in the real estate at South Chester, Penn., used and occupied in their business, and all
66 the buildings, machinery, engines, tools, gearings, fixtures, and apparatus now belonging to this company and used in the said business, together with all its corporate rights and franchises of every description, and full power is given to the president and treasurer to incorporate in such mortgage all such clauses, provisions, and stipulations as they may see fit to adopt.

A vote of the stockholders being taken, the resolution was unanimously adopted.

The majority of the stock and stockholders being present and having voted in its favor.

The proceedings of the meeting of directors held Aug. 3, 1880, *was* submitted to this meeting for consideration, and, upon motion, preamble and resolutions adopted at said directors' meeting were approved and ratified, and the president is authorized to execute the general assignment after the mortgage and assignment of lease to A. B. Wood *is* duly executed and delivered.

No other business being before the meeting, it was adjourned.

(S'g'd) JOHN SHOTWELL, *Sec't'y.*"

Mr. TRACY: Then on the next page is a meeting of the board of directors of the corporation held in New York on the same day, August 20:

"Special meeting of the board of directors of the Chester Tube & Iron Company held at its office, in the city of New York, Aug. 20, 1880.

"Present: A. B. Wood, W. S. McManus, D. F. Houston, John Shotwell.

67 "Minutes of last meeting of board of directors read and approved.

"The proceedings of the stockholders' meeting held this day were submitted and read, and in pursuance thereof the following resolution was presented for the consideration of the board of directors:

"'Whereas a majority in number and value of the stockholders of this company, at a meeting duly convened and held this the 20th

day of August, 1880, have, by resolution unanimously adopted, authorized and directed the execution and delivery *by* a bond and mortgage by this company to A. B. Wood, trustee, for Jno. E. and Mary D. Browning for the sum of $11,210 and interest from July 4th, 1880, payable in six months from the date thereof, and have also directed that all the interests of this company in the leasehold, machinery, and fixtures be sold and assigned to said A. B. Wood for the sum of $12,260: Therefore,

"'Resolved, That the bond and mortgage from this company to A. B. Wood, trustee, for $11,210, and the assignment of lease from said company to A. B. Wood for the consideration of $12,260, all have — read to and approved by the board of directors, be duly executed under the corporate seal, attested by the president and treasurer, — be delivered to said A. B. Wood, trustee, and A. B. Wood individually as the acts and deeds of this company for the purpose therein expressed.'

"A vote of directors being taken, the resolution was unanimously adopted.

"No other business being before the board, the meeting was adjourned.

"(S'g'd) JOHN SHOTWELL, *Sec't'y.*"

68 Special meeting of directors held September 16th, 1880, at the office of the company at South Chester, Penna., pursuant to the following call, to wit:

OFFICE OF THE CHESTER TUBE & IRON CO.,
NEW YORK, *September* 14, 1880.

The undersigned, being three-fifths of the board of directors, hereby call a meeting of the board to be held at the principal office of the company at Chester, Pa., on Thursday, Sep. 16th, 1880, at one o'clock p. m., for the purpose of taking into consideration the present critical state of aff-irs of the company and of taking decisive action thereon.

(Signed by) A. B. WOOD,
JNO. SHOTWELL, AND
F. C. SHOTWELL.

There were assembled at the principal office of the company at So. Chester, Penna., at one o'clock p. m., this day, Messrs. D. F. Houston & John Shotwell, and due proof was made of the service of notice of the meeting on the remaining directors, Messrs. W. S. McManus, A. B. Wood, F. C. Shotwell.

No quorum appearing, on motion, the meeting adjourned to meet at five and a half o'clock p. m. at same place.

At five and a half o'clock p. m. the meeting of directors reassembled, pursuant to adjournment, and there were present Messrs. A. B. Wood, D. F. Houston, F. C. Shotwell, and John Shotwell, a quorum, W. S. McManus, the only remaining director, being absent. Mr. D. F. Houston stated to the meeting that he had personally served a copy of the above notice upon W. S. McManus per-
69 sonally on the day previous about one o'clock.

The minutes of directors' meeting were read and approved.

It was stated that the president of the company had undertaken to make an assignment on behalf of the company to Henry Potts, Jr., and that the secretary and treasurer had not joined in same. After discussion the following resolutions were adopted by the board:

Resolved, That the act of William S. McManus, as president of this company, in attempting to execute and deliver a deed of assignment which does not bear the signatures of the secretary or treasurer to Henry Potts, Jr., under date of September fourteenth, 1880, was without authority and is void and in fraud of the rights of this company and against the will of the directors and stockholders, and that the possession and use of the seal of the company by the said William S. McManus was illegal.

Resolved, That the said pretended assignment be repudiated by this board, and that the said Henry Potts, Jr., be notified of this action and warned against taking any steps to execute the same.

Resolved, That the said William S. McManus be, and he is hereby, removed from his said office of president, and that D. F. Houston be, and he is hereby, elected as president to fill the vacancy.

Resolved, That the secretary and treasurer of this company
70 be given full power and authority to take such action and make any and all such contracts and arrangements, commence, carry on, and settle suits, employ all such agents, and generally do all and everything that in his judgment may be necessary and expedient to prevent the said pretended assignment from being consummated.

Resolved, That the said secretary and treasurer be, and he is hereby, authorized to take into possession and preserve the property of the company; also books and accounts of the company.

Resolved, That the secretary and treasurer be authorized to give due notice of these proceedings to all parties interested.

Resolved, That Patrick Reilly be, and he is hereby, appointed general manager of the Chester Tube & Iron Company, to hold the same appointment during the pleasure of the board of directors.

Resolved, That when the board adjourns it adjourns to meet at Chester, Penna., Saturday, September 18th, 1880, at eleven and a half o'clock a. m.

No other business before the board, it adjourns to meet as above.

(Signed) JOHN SHOTWELL, *Sec't'y.*"

71 (By defendant's counsel:)

Q. State whether or not Mr. Wallace, at any time after he had subscribed for this stock, offered to pay for it.

Objected to by counsel for the plaintiff on the ground that it is not within the power of the board of directors, and certainly not within the power of an officer, to negotiate in any way with the stockholders in regard to whether they shall or shall not pay and have their stock as against an assignee for creditors.

Objection overruled, and exception by plaintiff's counsel.

A. He did offer to pay me, as treasurer, the amount of his sub-

day of August, 1880, have, by resolution unanimously adopted, authorized and directed the execution and delivery *by* a bond and mortgage by this company to A. B. Wood, trustee, for Jno. E. and Mary D. Browning for the sum of $11,210 and interest from July 4th, 1880, payable in six months from the date thereof, and have also directed that all the interests of this company in the leasehold, machinery, and fixtures be sold and assigned to said A. B. Wood for the sum of $12,260: Therefore,

"'Resolved, That the bond and mortgage from this company to A. B. Wood, trustee, for $11,210, and the assignment of lease from said company to A. B. Wood for the consideration of $12,260, all have — read to and approved by the board of directors, be duly executed under the corporate seal, attested by the president and treasurer, — be delivered to said A. B. Wood, trustee, and A. B. Wood individually as the acts and deeds of this company for the purpose therein expressed.'

"A vote of directors being taken, the resolution was unanimously adopted.

"No other business being before the board, the meeting was adjourned.

"(S'g'd) JOHN SHOTWELL, *Sec't'y.*"

68 Special meeting of directors held September 16th, 1880, at the office of the company at South Chester, Penna., pursuant to the following call, to wit:

OFFICE OF THE CHESTER TUBE & IRON CO.,
NEW YORK, *September* 14, 1880.

The undersigned, being three-fifths of the board of directors, hereby call a meeting of the board to be held at the principal office of the company at Chester, Pa., on Thursday, Sep. 16th, 1880, at one o'clock p. m., for the purpose of taking into consideration the present critical state of aff-irs of the company and of taking decisive action thereon.

(Signed by) A. B. WOOD,
JNO. SHOTWELL, AND
F. C. SHOTWELL.

There were assembled at the principal office of the company at So. Chester, Penna., at one o'clock p. m., this day, Messrs. D. F. Houston & John Shotwell, and due proof was made of the service of notice of the meeting on the remaining directors, Messrs. W. S. McManus, A. B. Wood, F. C. Shotwell.

No quorum appearing, on motion, the meeting adjourned to meet at five and a half o'clock p. m. at same place.

At five and a half o'clock p. m. the meeting of directors reassembled, pursuant to adjournment, and there were present Messrs. A. B. Wood, D. F. Houston, F. C. Shotwell, and John Shotwell, a quorum, W. S. McManus, the only remaining director, being absent. Mr. D. F. Houston stated to the meeting that he had personally served a copy of the above notice upon W. S. McManus per-
69 sonally on the day previous about one o'clock.

The minutes of directors' meeting were read and approved.

It was stated that the president of the company had undertaken to make an assignment on behalf of the company to Henry Potts, Jr., and that the secretary and treasurer had not joined in same. After discussion the following resolutions were adopted by the board:

Resolved, That the act of William S. McManus, as president of this company, in attempting to execute and deliver a deed of assignment which does not bear the signatures of the secretary or treasurer to Henry Potts, Jr., under date of September fourteenth, 1880, was without authority and is void and in fraud of the rights of this company and against the will of the directors and stockholders, and that the possession and use of the seal of the company by the said William S. McManus was illegal.

Resolved, That the said pretended assignment be repudiated by this board, and that the said Henry Potts, Jr., be notified of this action and warned against taking any steps to execute the same.

Resolved, That the said William S. McManus be, and he is hereby, removed from his said office of president, and that D. F. Houston be, and he is hereby, elected as president to fill the vacancy.

Resolved, That the secretary and treasurer of this company
70 be given full power and authority to take such action and make any and all such contracts and arrangements, commence, carry on, and settle suits, employ all such agents, and generally do all and everything that in his judgment may be necessary and expedient to prevent the said pretended assignment from being consummated.

Resolved, That the said secretary and treasurer be, and he is hereby, authorized to take into possession and preserve the property of the company; also books and accounts of the company.

Resolved, That the secretary and treasurer be authorized to give due notice of these proceedings to all parties interested.

Resolved, That Patrick Reilly be, and he is hereby, appointed general manager of the Chester Tube & Iron Company, to hold the same appointment during the pleasure of the board of directors.

Resolved, That when the board adjourns it adjourns to meet at Chester, Penna., Saturday, September 18th, 1880, at eleven and a half o'clock a. m.

No other business before the board, it adjourns to meet as above.

(Signed) JOHN SHOTWELL, *Sec'ty.*"

71 (By defendant's counsel:)

Q. State whether or not Mr. Wallace, at any time after he had subscribed for this stock, offered to pay for it.

Objected to by counsel for the plaintiff on the ground that it is not within the power of the board of directors, and certainly not within the power of an officer, to negotiate in any way with the stockholders in regard to whether they shall or shall not pay and have their stock as against an assignee for creditors.

Objection overruled, and exception by plaintiff's counsel.

A. He did offer to pay me, as treasurer, the amount of his sub-

scription for this stock several times—offered to pay the amount of his subscription, $15,000.

Q. What did you say to him?

Objection by counsel for plaintiff. Objection overruled, and exception *to* plaintiff's counsel.

A. I told him I could not deliver it—could not accept his money.

Q. You told him you could not accept his money?

A. Yes, sir. As near as I can remember, he made this offer four or five times. I remember an occasion when I was in his store, and he told me he wanted to pay for the subscription and sent for a checque book, and I went out of the store. I can't fix the time exactly. It was during the boom in iron. It was in 1879, as near as I can remember—before 1879.

72 Q. Did you confer with the president of the company on the subject as to whether you should receive Mr. Wallace's money?

A. I asked him; yes, sir.

Q. What did he say to you?

Counsel for plaintiff objected to this question on the ground that it called for immaterial testimony and that it is incompetent.

WITNESS: I stated to the president that Mr. Wallace had spoken about taking the stock and asked what I should do if he offered me the money. He said that he couldn't have a share; that it belonged to him. The exact words are he said, "He couldn't have a damned share." That conversation took place in Greenwich street; that was the answer he gave me about receiving Mr. Wallace's money. He told me what I should do if Wallace offered the money. He said, No; that Wallace shouldn't have a damned share. Or, in in other words, if I may correct that statement, he stated that Mr. Wallace during the low prices of iron had said nothing about taking it, and now that there was a boom in iron and there was a prospect of making a good deal of money that he couldn't have a damned share. There was a boom in iron, as near as I can remember, in 1879. We were making a large amount of money. Mr. Wallace's office was in New York; he represented the company in the East and and partially in New York. The firm was Wallace & Company, composed of the defendant and Mr. Bispham. We allowed them five per cent. on sales and they guaranteed them. They found the purchasers and made the contracts of sale and guaranteed the prices.

73 Q. Do you know whether at the time the company failed the firm of Wallace & Company presented a claim against your company for contracts that they had to make good?

Plaintiff's counsel excepted to this evidence. Objection sustained.

On the cross-examination by plaintiff's counsel the witness testified as follows:

The book shown me is the record of the transfers of the capital

stock; it is a book that was got up in the latter part of the company's existence; it was got up by order of the president to note those changes in the stock; the entries are all made in my handwriting.

Book offered in evidence and marked Plaintiff's Exhibit No. 7.

Referring to the several conversations which I had with Mr. Wallace in relation to this subscription, I can't give the dates. It was during the boom in iron; it was all in 1879; there was nothing subsequent to that. Mr. Wallace attended the meeting of the stockholders on January 21st, 1880. He attended the meeting of the board of directors on the 6th day of July, 1880. All of the conversations were had in relation to this offering to pay for the stock; were had some six months or a year before he resigned as a director of the company; about six, I think. I don't remember the exact time. I was not in the habit of consulting frequently with Mr. Wallace in regard to the affairs of the company. I had a habit of going into his office, in Maiden Lane, and talking with him about
74 the company's affairs, and talking with him in reference to orders he had taken, and when he wanted me with reference to orders he sent for me. I may have been there once a day or two or three times a day. There were orders coming up all the time, and there were some as to which he didn't think of consulting me. I ascertained that the company was in embarrassed circumstances in 1880; can't say that it was in the month of May. I think it was in the spring of 1880. I cannot state accurately when it was. I don't remember that it was as early as the month of June. I remember some time during the latter part of the spring or early in the summer that the company found it needed more money, and we got assis' nce at that time which we supposed would carry us through. We were pressed for money at that time. Our notes went to protest as early as August or September. I think not in June. Up to that time we required more money. We had spent a good deal in building and we required more money. I don't remember that there was a note to the Bay State Iron Company that was not paid in June.

Defendant's redirect examination of witness, who testified as follows:

These demands of Mr. Wallace began in 1879. As near as I can remember, it was in the latter part of 1879. I don't remember all the demands, but I remember his making a great many offers. I won't say there was not any demand made after the meeting
75 in January, 1880. I don't remember; all I mean to say is that these demands began in the year 1879.

By plaintiff's counsel:

Q. You don't remember any demand after 1879?
A. I don't remember.
Q. Any request that you should issue the stock?
A. I don't remember.

By defendant's counsel:

Q. Do you remember the particular date of any of these demands?
A. I don't rem-ber the particular date of any; I simply remember the fact.

By plaintiff's counsel:

Q. The stock that was transferred to McManus in addition to the one share which he had on formation of the company was made in 1880. At the time of the conversation with you in relation to Wallace's stock he only held one share of stock on the books of the company?
A. Yes, sir.

By defendant's counsel:

Q. Can you fix the date when that transfer was made to him on the books?
A. I think, as near as I can remember, it was made in July.

By plaintiff's counsel:

Q. Was it in July, 1880?
A. I can give you the whole conversation if you want it.

By defendant's counsel:

Q. You think it was in July?
A. I think so.

WILLIAM BISPHAM, called as a witness for the defendant, sworn, and testified as follows:

I am a partner of the defendant and have been so since 1867, and was such in the years 1878, 1879, and 1880. I knew Mr.
76 Shotwell, the secretary of the Chester Tube & Iron Company, and was present when Mr. Wallace demanded of him the stock for his subscription and offered to pay for it.

This testimony was objected to by plaintiff's counsel on the ground that the same is incompetent and immaterial. Objection overruled, and exception by plaintiff's counsel.

I remember four or five such occasions. They began in the autumn of 1879 and extended through that winter and into the spring of 1880, according to my best memory.
Q. Can you state what occurred on this occasion between Mr. Wallace and Mr. Shotwell?

Objected to by plaintiff's counsel as immaterial, incompetent, and irrelevant. Objection overruled, and plaintiff's counsel excepts.

A. Mr. Wallace said to Mr. Shotwell, I want to take that stock of the Chester Tube & Iron Company, and I am ready to give you a checque for the amount. Mr. Shotwell replied, I can't give it to you, and almost immediately afterwards left the office.
Q. What did he say, if anything, about receiving the money?

A. He refused to accept the money or to deliver the stock. I remember one occasion when Mr. Wallace sent for his checque book to draw a checque. The demand by Mr. Wallace was made in almost the same words I have given above. Mr. Wallace rang his bell for the cashier to bring in the checque book. I think the cashier brought the checque book, and he got as far as Mr.
77 Wallace's desk, and Mr. Shotwell turned on his heel and walked out of the office. He said to Mr. Wallace, I can't give you the stock. Aside from the occasion when he sent for his checque book and he made the demands for this stock and the refusal to accept the money and deliver it, were substantially in the words I have given; almost identical. There were four or five of these occasions; possibly more. I remember, at any rate, four or five times. I think the last of these occasions was in March or April, 1880. Mr. Wallace was responsible and able to pay his subscription at the time I am speaking of and on all occasions.

This testimony was objected to by counsel for the plaintiff. Objection overruled, and plaintiff's counsel excepts.

WILLIAM H. WALLACE, sworn as a witness in his own behalf, testified as follows:

I am the defendant in this action.

Q. After having made your subscription to this stock did you demand it of the executive officer of the company on any occasion?

Objected to by plaintiff's counsel on the ground that it is incompetent and immaterial. Objection overruled, and exception by plaintiff's counsel.

A. On a number of occasions I made a demand from the treasurer and offered to pay him the subscription price of the stock. I did this on a good many occasions—on at least half a dozen—commencing in the fall of 1879 and extending through to 1880. I
78 don't remember how late in 1880.

By the COURT:

Q. Was there any after the directors' meeting that you attended July 6th?

A. I made no tender after the concern got into trouble. The stockholders' meeting that the witness attended was in January, and then he attended a directors' meeting July 6th, as I understand.

Counsel for defendant says: I don't understand that he attended a directors' meeting. I understand he tendered his resignation at that time.

By PLAINTIFF'S COUNSEL: The minutes show when he attended a directors' meeting.

By the COURT:

Q. Did you tender money and demand the stock after the meeting of July 6th?
A. No, sir.

By defendant's counsel:

Q. When did you tender your resignation as a director of the company?
A. I think it was in July, 1880.
Q. Do you remember whether you took any part in that meeting except to tender your resignation?

Objected to by plaintiff's counsel. Objection overruled, and plaintiff's counsel excepts.

A. I don't.
Q. Did you act as a director of that meeting?

Objected to by plaintiff's counsel on the ground that the minutes of the board of directors of the company are conclusive evidence of the parties who were present and took part in the business of
79 the meeting. Objection overruled. The minutes show that Mr. Wallace was present and took part *on* that meeting; and plaintiff's counsel excepts.

A. I did nothing at that meeting except to tender my resignation. I went there for that purpose.
Q. Had you taken any part in the management of this company or as a stockholder of this company from January 1, 1880?

Objected to by plaintiff's counsel as incompetent, it appearing that he was a director down to 6th July. Objection overruled, and plaintiff's counsel excepts.

A. I did nothing as a stockholder or director except to tender my resignation as a director after January 1, 1880.

Plaintiff's counsel objected to this testimony on the ground that it is incompetent for the witness, after attending the meeting, to contradict the minutes as they are found on the record, and that it is further incompetent for him to say whether he did or did not take any part in it at that time. He was there as a member of the board and acted as such. Objection overruled, and plaintiff's counsel excepts.

Q. On these occasions, when you offered to pay Mr. Shotwell for this stock, what did he say about receiving the same?
A. On one occasion particularly, I can't take it, and turned on his heel and went out of the office; left me rather abruptly. This was the occasion when I sent for my check book to draw a check. My recollection is that this was in the fall of 1879. He told me on other occasions when I offered him the money, I don't want your

80 money and I haven't got any stock for you. On one occasion he told me he had $40,000 in the bank then.

Q. Did he ever say to you that he wouldn't receive the money and wouldn't give you the stock?

Objected to as leading. Objection overruled, and plaintiff excepts.

A. Yes, sir; he used that form of expression on two occasions. He said the same thing in effect, if not exactly in those words, every time I spoke to him about it. On two occasions I remember distinctly that he said he wouldn't take the money and he wouldn't give me the stock. These two occasions were in the fall of 1879. On other occasions his language was "got plenty of money."

On his cross-examination the witness testified as follows:

I was one of the original incorporators of this company. I signed the papers at the mill office at South Chester—whereever the office of the mill was. I continued to take an interest in the affairs of the company from that time. I frequently consulted with Mr. McManus about the affairs of the company; always asked him about it whenever I saw him. I didn't see him frequently. He was in New York occasionally on the business of the company. He consulted me in regard to the business of the company, but never regarding the making of the goods. It was in regard to the commercial aspects of the company's business. The business of the company was putting these goods on the market & finding out what the prices were, &c.

Q. This continued down to August, 1880?

81 A. It continued down to the time when they got into trouble. I first learned that the company was in trouble in June of 1880, I think. I learned then that they were embarrassed for want of money. The president consulted with me in regard to the company's affairs after that. I suppose that these consultations continued down to two or three months before the final collapse. I didn't see much of him in August or September. I don't remember that I saw him in August frequently in regard to it. It was early in July, I think, that the meeting was that I attended. I saw him probably during July; whether during August I don't remember. He and I didn't have frequent conversations in regard to the condition of the company's business about this time. I think he was there twice; I think as often as twice in July. I distinctly remember once in my office. I think it was in July, but I can't call it in mind. There was Mr. Houston, who came to my office and we had a talk over the affairs of the company; I remember that very distinctly. I do remember seeing him at other times, but that was the one time I remember; I don't remember the precise day.

On his redirect witness states:

Our firm continued to be the agents of the company up to the time of its failure, and what I was seeing the president about was busi-

ness connected with the company—the selling of goods and collecting of accounts due, &c.

On his recross-examination witness further testified:

82 The conversations I had with Captain McManus or Mr. Houston was in relation to the condition of the company.

By defendant's counsel:

Q. What do you mean by the condition of the company?

A. In July this conversation took place. It was along in July after the company became involved. It was then in regard to the outlook of the company and its condition and affairs and so on. This was after I had resigned as director. He was giving me a statement of the condition of the company. In January, 1880, he gave me a statement of the condition of the company.

Paper shown to witness.

This is the paper that he showed me.

Defendant's counsel offered in evidence by-laws 14 and 15 of the company, reading as follows:

Article 14. The president and treasurer, with the approval of the board of directors, shall have full power and authority to seal and convey under the seal of the company all or any part of the real estate of the company.

Article 15. None of the foregoing by-laws, rules, or regulations shall be repealed or altered except at the annual meeting of the stockholders or a special meeting of the same called for that purpose."

Objected to by plaintiff's counsel. Objection overruled, and plaintiff's counsel excepts.

WILLIAM S. MCMANUS, called as a witness for the plaintiff, testified as follows:

83 Q. You heard Mr. Shotwell's testimony in regard to the delivery of stock and the taking of payment for it from Mr. Wallace. Will you state whether you have any knowledge in regard to Mr. Wallace ever tendering you payment for any stock of the company?

A. None whatever. I have no recollection or any knowledge of any statement made to me by the secretary or treasurer, Mr. Shotwell, that Mr. Wallace made any tender or desired any of the stock. I gave no instructions whatever to the secretary in regard to Mr. Wallace's stock. I never at any time refused to accept payment of the stock and issue a certificate. I have no recollection or knowledge of ever having given any instructions to Mr. Shotwell not to take this payment and issue the stock. I went and consulted Mr. Wallace frequently in regard to the company. Mr. Wallace took a great deal of interest in the concern. I had interviews with him right along.

Q. State what took place between you and Mr. Wallace in refer-

ence to the management and conduct of the company from the time it organized down to the time of the failure.

A. About the first of June I went to Mr. Wallace. I said to him that I wanted him to use his influence with Shotwell to get up our statement, our balance-sheet showing the condition of the concern; that it was needed, and that probably by getting it promptly we might be able to get money, naming certain parties that we might get money from and asking him to use his influence with Shotwell to give us that statement. He said he would do all he could
84 to get Mr. Shotwell to furnish us that statement. I had consultations with Mr. Wallace into July. I visited him on several occasions. I was present on an occasion when Mr. David Houston was there. We consulted with Mr. Wallace as to the condition of the company. I can't recollect the words of the consultation, but I can give the course of it and the object that we went there for. The substance of what we went there for was to get money from Mr. Wallace to help us. The substance of this conversation was that we went to Mr. Wallace's to get money and he refused to let us have it. At the time that Mr. Shotwell says that he had the conversation with me about this stock of Mr. Wallace's I held one share of the stock. I held this up to June, 1880. I acquired other shares, which I held for certain money which I paid into the institution. I didn't have any stock that Mr. Wallace was entitled to and had no claim upon any of his stock.

Cross-examination:

After the company commenced business I supposed it would make money. I supposed we were making reasonable profits up to the first of 1880.

Q. Didn't you think you were making large profits?

A. I could have showed large profits.

Q. You supposed you were making them?

A. No, sir.

Q. You didn't?

A. No, sir.

Q. You could have shown them. What do you mean, that you could have shown them when you didn't suppose you were making them? I don't understand that exactly.

A. I mean to say that the way iron went up we had large
85 quantities produced, and that if we had taken the prices at which the iron went to we could have shown on our books large profits; but I considered that speculative and would only take it at the price on the stock book that I would pay for it. Wallace wanted me to do that, which would have made a profit of $100,000 difference on our books, which I refused to do. We had the iron; it was bringing the market price, so that if we had taken the market price we could have shown a profit. It would have shown large profits—about $150,000. We manufactured a large amount of this iron at the highest prices. We began when everything was low, but we had to run upon orders which did not take the iron I

had bought in stock. Iron went very low in 1878, and we bought and manufactured right along. I don't remember making a statement to Wallace January 7th, 1880, of how the company stood. I might probably have given him a memorandum.

Memorandum shown to the witness which had been shown to Shotwell.

I don't recollect it. I have no recollection of making such a statement.

Plaintiff rests.

86 WILLIAM H. WALLACE recalled as a witness for the defendant:

Q. On January 7th, 1874, did Mr. McManus, the president of the company, make a statement of its then condition?

Objected to by plaintiff's counsel. Objection overruled. Exception.

A. He did.

Q. At the time you demanded this stock was the company, according to your information, prosperous?

Objected to by plaintiff's counsel as immaterial. Objection overruled. Plaintiff excepts.

A. Highly so; highly valuable.

Q. Was it worth more than the subscription price of the stock?

Objected to by plaintiff's counsel. Overruled. Exception.

A. Why, certainly; he showed a surplus of $100,000.

Q. When?

A. 7th of January, 1880.

Paper shown witness marked, for identification, B.

That is in Mr. McManus' handwriting. He didn't make any statement to me in regard to it. I took this statement down while he was talking to me; it was from conversations with him.

Q. So long as you considered the stock good you were ready to take it and pay for it. Is that so?

A. Yes, sir.

87 Redirect examination:

This statement was taken down while he was in the office. I wrote it down. I was trying to find out something about the concern, and the figures you have stated he gave you as president of the company. This was January 7th, 1880.

Defendant's counsel proposes to read the papers.

Objection by plaintiff's counsel as immaterial.

Q. Give details of the statement as he gave them to you—the figures.

A. I said, Captain, I wish you to tell me precisely how that concern down at Chester stands. I want to know precisely what you have got and what you owe. He said I can give you that in a very few words, and then he made this statement that the total cost of the plant to January 1st, including furnace, engines, boilers, pumps, duplicates, buildings, and franchise complete, and the money was $114,000, and that they had twenty acres of land at $2,000 each, making $40,000, making the total $154,000; that they owed for the land $40,000 and for other indebtedness $14,000, making $54,000, leaving $100,000, of which he said one-half belonged to him and one-half belonged to Mr. Wood. I asked how much money had been put in, and he told me the total cash paid in had been $60,000.

Q. That would make a surplus, then, of $40,000 instead of $100,000?

A. No.

Q. Well, it would make a surplus, including the capital paid, of $100,000?

A. Yes, sir.

88 Q. But it would take $40,000 of profits that had gone into the assets of the concern if the net assets were $100,000 and $60,000 of cash had been paid in?

A. No; this was a net amount of $100,000, the difference between what they had and what they owed.

Q. But $60,000 had been paid in cash and $40,000 must have come in as profits then upon that?

A. Oh, yes.

Q. What did Captain McManus say about that?

A. He said precisely what I have stated and what I have noted down here.

Q. What did he mean by saying that one-half belonged to Mr. Wood and one-half belonged to himself?

Objected to as immaterial.

A. He said just that. He said one-half belonged to A. B. Wood and the other half belonged to him.

WILLIAM MCMANUS recalled as a witness for plaintiff:

I have no recollection of Mr. Wallace taking down any statement I made to him. I have no recollection of the transaction at all. I may have spoken, of course, with Mr. Wallace, and I don't know what he has put down. We had many interviews on data and statistics belonging to the concern.

89 WILLIAM H. WALLACE, called for defendant, testifies as follows:

I remember the occasion when I tendered my resignation as a director of the company. It was at a meeting held July 6th, 1880. I went into the office of the company and offered my resignation and immediately withdrew. I was not in the room three minutes,

I think. I took no part in the transaction of the business of the meeting of that day. That was the first thing that was done.

Counsel for plaintiff moved to strike out the last sentence in the answer.

Motion overruled, and plaintiff's counsel excepts.

JOHN SHOTWELL recalled for the defendant:

I was secretary of the company. I remember the meeting of the directors of July 6th, 1880.

Q. Do you remember Mr. Wallace tendering his resignation on that occasion?

Objected to by plaintiff's counsel as immaterial and incompetent, and that the minutes of the board are the best evidence.

Objection overruled, and plaintiff excepts.

A. Yes, sir; I don't remember that Mr. Wallace did anything aside from tendering his resignation at that meeting.

On cross-examination:

Q. Will you look at the minutes of the meeting of the directors held in New York on July 6th, 1880?

A. Yes, sir.

90 Q. That is your entry of the minutes?

A. Yes, sir.

Q. And that gives the proceedings of that meeting, does it not?

A. It gives the proceedings of the meeting.

Counsel for the plaintiff offers in evidence the entry.

Objected to by defendant's counsel.

Q. Do you remember when you wrote up these minutes?

A. As near as I can remember, they were written up the last day. I have no recollection of Mr. Wallace taking any part in the meeting after tendering his resignation.

Cross-examined by plaintiff's counsel:

Q. You have no recollection that he did not write this statement?

A. If I can explain how I made these minutes perhaps you will understand it better.

By defendant's counsel:

Q. Will you state how at the meeting you kept the minutes of the transactions that took place there and how the book was written up?

Objected to by plaintiff's counsel as incompetent.

Objection overruled. Plaintiff excepts.

A. The minutes themselves were made on a pad and the next day they were copied from the pad—a small pad.

(By plaintiff's counsel:)

Q. And were copied directly from the pad into the book?

A. I wouldn't swear that they come into rotation that way.

Q. You have no recollection but what they did?
A. I don't think they did.
91 Q. You have no recollection about it, have you?
A. I wouldn't swear either way.

(By defendant's counsel:)

Q. These minutes were made on a small pad, on different leaves, and no one leaf contained the entire proceedings of the meetings?
A. No, sir; several sheets.

(By plaintiff's counsel:)

Q. The vacancy occasioned by Mr. Wallace's resignation was not filled until the next meeting, was it?
A. I don't remember that. (On looking at the book of minutes of the company at the head of the page of minutes of July 14, 1881, the witness answered:) F. C. Shotwell was elected a member of the board to take the place cacated by W. H. Wallace on the 14th July, 1880.

Counsel for plaintiff offers in evidence a memorandum of the changes of the capital stock on the books of the company.
Papers marked Plaintiff'- Exhibit No. 8.

92 No. 8.

Capital Stock of Chester Tube & Iron Co.

Amount of capital stock subscribed, as follows:		Amounts paid in on ac. of subscriptions.	
A. B. Wood	1,000 shares	A. B. Wood	$38,632 24
W. S. McManus	1 "	W. S. McManus	27,432 45
W. H. Wallace	300 "	W. H. Wallace	
Jno. Shotwell	510 "	Jno. Shotwell	150 00
Patrick Reilly	100 "	P. Reilly	50 00
Theo. F. Jenkins	80 "	Theo. F. Jenkins	
James Archer	9 "	Jas. Archer	
		A. B. Wood	4,358 70

The following shares were transferred to W. C. McManus:
Jas. Archer, 9 shares.
Theo. F. Jenkins, 80 "
Jno. Shotwell, 310 "
A. B. Wood, 150 "
W. S. McManus transfers, June, 1880, to D. F. Houston, 2 shares; F. C. Shotwell, 1 share.
A. B. Wood transfers, Sept. 13, 1880, to D. F. Houston, 2 shares; to F. C. Shotwell, 1 share.

93 It is conceded by both parties that there was no meeting of the board of directors from January 21, 1880, to July 6th, 1880.

Mr. WALLACE recalled as witness for defendant:

Q. You have heard the minutes of July 6th read by Mr. Ward?
A. Yes.
Q. Did you vote on any of those questions?

Objected to as incompetent. Objection overruled, and plaintiff's counsel excepts.

A. No, sir.
Q. Did you tender your resignation before Mr. Reilly did his?
A. I don't know what was done after I left. I went into the room and offered my resignation. It was accepted unanimously, and I withdrew. I wasn't in the room five minutes.

Cross-examination by plaintiff's counsel:

Q. That was your only offer or tender of resignation?
A. Yes.

Plaintiff's counsel offers a computation of the interest to date—principal, $15,000; interest, $6,820; making $21,820.

Counsel for plaintiff and defendant each concede that there is no question of fact to be submitted to the jury.

Testimony closed.

Counsel for defendant requests the court to direct the jury to find a verdict in favor of the defendant.

94 Counsel for the plaintiff requests the court to direct a verdict in favor of the plaintiff.

Plaintiff's motion to the court to direct a verdict in favor of the plaintiff was denied by the court, and plaintiff's counsel duly excepted to the ruling of the court in that behalf.

The court, on defendant's motion, directed a verdict in favor of the defendant, and plaintiff's counsel duly excepted to the ruling in that behalf.

Plaintiff's counsel made a motion for a new trial on the minutes which motion was denied, and plaintiff's counsel duly excepted.

This includes all the testimony in the case.

The jury, under the direction of the court, found a verdict for the defendant.

Trial concluded May 9, 1888.

And because none of said exceptions so offered and made to the rulings and opinions and decisions of the said presiding judge do appear upon the record of the said trial, and a case having been made by the defendant, under leave reserved to turn the same into a bill of exceptions:

Now, therefore, on the prayer of the said defendant, the said case is turned into the foregoing bill of exceptions, and the same are hereby stated, settled, and allowed as of the term when said cause was tried, to wit, the May term, A. D. 1888.

95 Witness my hand and seal this fifth day of July, A. D. 1888, as of the term aforesaid.

E. HENRY LACOMBE.

It is hereby stipulated and agreed by the attorneys for the respective parties that the foregoing bill of exceptions be allowed and settled as above set forth, and that the same be signed and filed *nunc pro tunc* as of the May term, 1888, of said circuit court.

TRACY, CATLIN & HUDSON,
Def't's Att'ys.

SIDNEY WARD, *Pl'ff's Att'y.*

So ordered.
E. H. LACOMBE.

Endorsed: Bill of exceptions. Filed 5th July, 1888.

96 At the May term, 1888, of the circuit court of the United States for the eastern district of New York, held on the 9th day of May, 1888.

Present: Hon. E. Henry Lacombe, circuit judge.

HENRY W. POTTS, as Assignee of the Chester Tube and Iron Company, Plaintiff,
against
WILLIAM H. WALLACE, Defendant.

This cause having been brought to trial at the May term, 1888, of this court, before the Honorable E. Henry Lacombe, circuit judge, and a jury, and the trial thereof having been begun on the 8th day of May, 1888, and finished on the 9th of May, 1888, and a verdict having been rendered in favor of the defendant against the plaintiff, and the plaintiff having thereupon, at the same term and on this 9th day of May, 1888, moved upon the minutes of the judge presiding to set aside the said verdict and grant a new trial upon the exceptions and because the said verdict is contrary to the evidence and contrary to law, and the said judge having entertained said motion and heard and considered the same: Now, on motion of Benjamin F. Tracy, Esq., of counsel for defendant, it is—

97 Ordered that the said motion be, and the same is hereby, in all respects denied.

E. HENRY LACOMBE.

Enter *nunc pro tunc* as of date.
May 9th, 1888.

E. H. LACOMBE.

Consented to.

TRACY, CATLIN & HUDSON,
Att'ys for Def't.

Endorsed: Order denying motion for new trial. Filed 5th July, 1888, as of May 9th, 1888.

98 Circuit Court of the United States for the Eastern District of New York.

HENRY W. POTTS, as Assignee of the Chester Tube and Iron Company, Plaintiff,
against
WILLIAM H. WALLACE, Defendant.
} Judgment. October, 1888.

The above-entitled action having been tried before the Honorable E. Henry Lacombe, circuit judge, and a jury at the May term of this court, and a verdict having been rendered in favor of the defendant against the plaintiff on the 9th day of May, 1888, and the plaintiff having made a bill of exceptions herein and the same having been settled and signed by the said judge, and the plaintiff thereupon having made a motion for a new trial on said exceptions, and the said motion having been entertained, and argued by Sidney Ward, Esq., for the plaintiff and Benjamin F. Tracy, Esq., for the defendant, and due deliberation having been had, and the court, after due consideration, having overruled and denied said motion and directed judgment to be entered on said verdict: Now, on motion of Tracy, Catlin & Hudson, attorneys for the defendant, it is adjudged, considered, and determined that said defendant do have and recover judgment against said plaintiff for the sum of seventy-eight $\frac{95}{100}$ dollars, costs and disbursements of this action as taxed, and that defendant have execution against plaintiff therefor.

By the court:

B. LINCOLN BENEDICT, *Clerk.*

Endorsed: Judgment-roll. Filed February 5, 1889.

99 Circuit Court of the United States of America for the Eastern District of New York, in the Second Circuit.

HENRY W. POTTS, as Assignee of the Chester Tube and Iron Company, Plaintiff,
vs.
WILLIAM H. WALLACE, Defendant.
} Bond for Damages and Costs.

Know all men by these presents that we, Henry W. Potts, of Shepherdstown, West Virginia, and Daniel F. Cooney and James F. Murphy, of the city, county, and State of New York, are held and firmly bound unto the above-named William H. Wallace in the sum of five hundred dollars, to be paid to the said William H. Wallace; for the payment of which, well and truly to be made, we bind ourselves and each of us, our and each of our heirs, executors, and administrators, jointly and severally, firmly by these presents.

Sealed with our seals and dated the twenty-first day of March, in the year of our Lord one thousand eight hundred and eighty-nine.

Whereas the above-named Henry W. Potts, as assignee of the Chester Tube and Iron Company, has prosecuted his writ of error to the Supreme Court of the United States to reverse the judgment rendered in the above-entitled suit by the judge of the circuit court of the United States for the eastern district of New York:

100 Now, therefore, the condition of this obligation is such that if the above-named Henry W. Potts, as assignee of the Chester Tube and Iron Company, shall prosecute his writ of error to effect and answer all damages and costs if he fail to make his said writ of error good, then this obligation shall be void; otherwise the same shall be and remain in full force and virtue.

HENRY W. POTTS. [L. S.]
DANIEL F. COONEY. [L. S.]
JAMES F. MURPHY. [L. S.]

Sealed and delivered and taken and acknowledged this 22nd day of March, 1889, before me by the said Henry W. Potts, to me personally known.

J. S. BRAGOMER,
[L. S.] *Notary Public.*

Sealed and delivered and taken and acknowledged this 28th day of March, 1889, before me by the said Daniel F. Cooney and James F. Murphy, both to me personally known.

WILLIAM J. CAMPBELL,
[L. S.] *Notary Public* (12), *New York City and County.*

101 UNITED STATES OF AMERICA, } ss:
State, City, and County of New York, }

Daniel F. Cooney and James F. Murphy, being severally duly sworn, each for himself doth depose and say that he resides in the city of New York and is worth the sum of one thousand dollars over and above his just debts and liabilities.

DANIEL F. COONEY.
JAMES F. MURPHY.

Subscribed and sworn to before me this 28th day of March, 1889.

WILLIAM J. CAMPBELL,
[L. S.] *Notary Public* (12), *New York City and County.*

The within bond approved as to form and sufficiency of sureties. April 4th, 1889.

E. HENRY LACOMBE.

Endorsed: Bond for costs, &c., on writ of error. Filed 5th April, 1889.

102 UNITED STATES OF AMERICA, ss:

The President of the United States of America to the judges of the circuit court of the United States for the eastern district of New York, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court, before you or some of you, between Henry W. Potts, as assignee of the Chester Tube and Iron Company, plaintiff, and William H. Wallace, defendant, a manifest error hath happened, to the great damage of the

said Henry W. Potts, as assignee of the Chester Tube and Iron Company, as is said and appears by his complaint, we, being willing that such error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the justices of the Supreme Court of the United States, at the Capitol, in the city of Washington, together with this writ, so that you have the same at the said place, before the justices aforesaid, on the second Monday of October next, that, the record and proceedings aforesaid being inspected, the said justices of the Supreme Court may cause further to be done therein to correct that error what of right and according to the law and custom of the United States ought to be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this 5th day of April, in the year of our Lord one thousand eight hundred and eighty-nine, and of the Independence of the United States the one hundred and thirteenth.

The Seal of the Circuit Court, Eastern District of New York.

B. LINCOLN BENEDICT,
Clerk of the Circuit Court of the United States of America for the Eastern District of New York, in the Second Circuit.

The foregoing writ is hereby allowed.

E. HENRY LACOMBE.

103 [Endorsed:] Supreme Court of the United States. Henry W. Potts, as assignee of the Chester tube and Iron Company, plaintiff in error, *vs.* William H. Wallace, defendant in error. Writ of error. Sidney Ward, attorney for plaintiff in error, 120 Broadway, New York city, N. Y. Due service of a copy of the within writ of error is hereby admitted this 6th day of April, 1889. Tracy, Catlin & Hudson, attorneys for defendant in error. Filed in the office of the clerk of the U. S. circuit court for the eastern district of New York this 15th day of May, 1889.

UNITED STATES OF AMERICA, *Eastern District of New York*, } *ss:*

I, B. Lincoln Benedict, clerk of the circuit court of the United States of America for the eastern district of New York, in the second circuit, by virtue of the foregoing writ of error and in obedience thereto, do hereby certify that the *following* pages, numbered from 1 to 101, inclusive, contain a true and complete transcript of the record and proceedings had in said court in the cause of Henry W. Potts, as assignee of the Chester Tube and Iron Company, plaintiff in error, against William H. Wallace, defendant in error, as the same remain of record and on file in said office.

In testimony whereof I have caused the seal of the said court to be hereunto affixed, at the city of Brooklyn, in the eastern district of New York, in the second circuit, this 22d day of May, in the year of our Lord one thousand eight hundred and eighty-nine, and of the Independence of the United States the one hundred and thirteenth.

The Seal of the Circuit Court, Eastern District of New York.

B. LINCOLN BENEDICT, *Clerk.*

104 UNITED STATES OF AMERICA, *ss:*

To William H. Wallace, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington on the second Monday of October, eighteen hundred and eighty-nine, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the eastern district of New York, wherein Henry W. Potts, as assignee of the Chester Tube and Iron Company, is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected and speedy justice should not be done to the parties on that behalf.

Dated April 8th, 1889.

E. H. LACOMBE.

105 [Endorsed:] U. S. Supreme Court. Henry W. Potts, as assignee of the Chester Tube and Iron Company, plaintiff in error, against William H. Wallace, defendant in error. Citation. Sidney Ward, attorney for plaintiff in error, 120 Broadway, N. Y. city. Due service of a copy of the within citation is hereby admitted this 13th day of April, 1889. Tracy, Catlin & Hudson, attorneys for defendant in error. Filed in the office of the clerk of the U. S. circuit court for the eastern district of New York this 15th day of May, 1889.

106 Supreme Court of the United States.

HENRY W. POTTS, as Assignee of the Chester Tube & Iron Company, Plaintiff in Error,
vs.
WILLIAM H. WALLACE, Defendant in Error.
} Assignment of Errors.

Afterwards, to wit, on the second Monday in October, in the same term, before the justices of the said court, at the Capitol in Washington, come the said plaintiff in error, by Sidney Ward, his attorney, and say that — the record and proceedings aforesaid there is manifest error in this, to wit, that by the record aforesaid it appears that the judgment aforesaid, in form aforesaid given, was given for the said defendant in error against the said plaintiff in error,

whereas by the law of the land the said judgment ought to have been given for the said plaintiff against the said defendant.

The plaintiff in error, the plaintiff in said action in said circuit court, also assigns his further causes of error in this behalf, to wit:

First. That on the trial of this action the court erred in admitting the proceedings of the meeting of the stockholders and of the board of directors of the Chester Tube & Iron Company held on August 20th, 1880, and also the record of the proceedings of the board of directors of said company held on September 16th, 1880; which
107 was objected to by plaintiff's counsel and received, subject to objection.

Second. That the court erred on said trial in receiving the minutes of the two meetings of the board of directors of August 12 and August 20, 1880; which were received, subject to the plaintiff's objection and exception.

Third. That said court erred on said trial in admitting in evidence the minutes of the meeting of September 16th, 1880; which were objected to by the plaintiff, and to the exception of which evidence plaintiff's counsel excepted.

Fourth. That the court erred in receiving the testimony of the witness, John Shotwell, as to whether at any time after he had subscribed to the stock the defendant offered to pay for it; which testimony was objected to by the counsel for the plaintiff, and to the exception of which plaintiff's counsel excepted.

Fifth. That the court erred on said trial in admitting the testimony of the witness, John Shotwell, as to the conversation between himself and the defendant; which testimony was objected to by plaintiff's counsel.

Sixth. That said court erred in allowing the witness, John Shotwell, to testify as to whether Mr. Wallace offered to pay for the stock; that the court also erred in admitting the testimony of the witness, John Shotwell, as to the conversation which he had with the president of the company in reference to Mr. Wallace's taking his stock; which testimony was received by the court, and to the exception of which plaintiff's counsel objected and excepted.

108 Seventh. That said court erred in admitting the testimony of the witness, William Bispham, as to conversations between defendant Wallace and Mr. Shotwell in reference to Mr. Wallace's demanding said stock and offering to pay for it; to the exception of which testimony plaintiff's counsel objected and excepted.

Eighth. That said court erred in receiving the testimony of the defendant Wallace in reference to his offering to take the stock for which he had subscribed and to pay for the same; which testimony was objected to by the plaintiff's counsel, and to the exception of which testimony plaintiff's counsel excepted.

Ninth. That the court erred in admitting the testimony of the defendant Wallace in regard to his action at the meeting of the board of directors of the Chester Tube & Iron Company held July 6, 1880; to the exception of which evidence plaintiff's counsel objected and excepted.

Tenth. That the court erred in admitting the testimony of the defendant Wallace as to his conversation with Mr. Shotwell in regard to demanding his stock and offering to pay for the same; to the exception of which evidence plaintiff's counsel objected and excepted.

Eleventh. That the court erred in admitting in testimony by-laws 14 & 15 of the Chester Tube & Iron Company; to the exception of which plaintiff's counsel objected and excepted.

Twelfth. That the court erred in admitting the testimony of William H. Wallace as to his conversation with William S. McMan-
109 nus, president of the company, in reference to the condition of the company; to which testimony plaintiff's counsel objected and excepted.

Thirteenth. That the court erred in refusing the plaintiff's motion to strike out the last sentence of the testimony of the defendant Wallace in regard to his action at the directors' meeting held on July 6, 1880.

Fourteenth. That the court erred in admitting the testimony of the witness, John Shotwell, in reference to the manner in which he kept the minutes of the meeting of July 6, 1880; to which testimony the plaintiff's counsel objected and excepted.

Fifteenth. That the court erred in receiving the testimony of the witness Shotwell in reference to the manner in which he kapt the minutes of the meeting of July 6, 1880; to which testimony the plaintiff's counsel objected and excepted.

Sixteenth. That the court erred in receiving the testimony of the defendant Wallace as to whether he voted on any of the questions at the meeting of the board of July 6, 1880; to which testimony plaintiff's cousel objected and excepted.

Seventeenth. That the court erred in refusing to direct a verdict in favor of the plaintiff upon the request of the plaintiff's counsel.

Eighteenth. That the court erred in directing a verdict in favor of the defendant; to which direction plaintiff's counsel duly excepted.

Nineteenth. That the court erred in refusing to grant a new
110 trial upon the motion made by plaintiff's counsel upon the minutes of the trial; to which refusal plaintiff'- counsel duly excepted.

And the said plaintiff prays that the judgment aforesaid for the error aforesaid and for other errors in the record and proceedings aforesaid may be reversed, annulled, and altogether held for nothing, and that he, the said plaintiff, may be restored to all things which he has lost by occasion of said judgment.

Dated New York, April 5, 1889.

SIDNEY WARD,
Attorney for Plaintiff in Error,
120 *Broadway, New York City.*

111 Due service of a copy of within assignment of error is hereby admitted.

Dated April 6, 1889.

TRACY, CATLIN & HUDSON,
Att'ys for Def't in Error.

[Endorsed:] Supreme Court of the United States. Henry W. Potts, as assignee of the Chester Tube and Iron Company, plaintiff in error, *vs.* William H. Wallace, defendant in error. Assignment of error. Sidney Ward, attorney for plaintiff in error, 120 Broadway, N. Y. city. Filed in the office of the clerk of the U. S. circuit court for the eastern district of New York this 15th day of May, 1889.

112 Supreme Court of the United States.

HENRY W. POTTS, as Assignee of the Chester Tube and Iron Company, Plaintiff in Error,
against
WILLIAM H. WALLACE, Defendant in Error.
} Joinder in Error.

And afterwards, to wit, on the second Monday of October, in said term, the said defendant in error, by B. F. Tracy, his attorney, comes here into court and says that there is no error either in the record or proceedings aforesaid or in the giving of the judgment aforesaid.

And he prays that the said Supreme Court, before the justices thereof now here, may proceed to examine as well the record and proceedings aforesaid as the matters aforesaid above assigned for error, and that the judgment aforesaid, in form aforesaid given, may be in all things affirmed, &c.

B. F. TRACY,
Attorney for Defendant in Error.

[Endorsed:] 1157. United States Supreme Court. Henry W. Potts, as assignee of the Chester Tube & Iron Company, plaintiff in error, *vs.* William H. Wallace, defendant in error. Joinder in error. B. F. Tracy, attorney for defendant in error, 35 Wall St., N. Y. city. Due service of a copy of the within joinder in error is hereby admitted this — day of ——, 188–. —— ——, attorney for plaintiff in error. To —— ——, attorney for plaintiff in error.

[Endorsed:] Sup. Court U. S. 1889, Oct'r term. No. 1157. Henry W. Potts, as assignee, &c., pl'ff in error, *vs.* Wm. H. Wallace. Joinder in error.

[Stamped:] Office Supreme Court U. S. Filed Sep. 27, 1889. James H. McKenney, clerk.

[Endorsed:] U. S. circuit court, east. dist. of N. Y. Henry W. Potts, assignee, &c., pl'ff in error, *vs.* William H. Wallace, def't in error. Record, writ of error, citation, and assignment of errors.

Endorsed on cover: Case No. 13,564. E. New York C. C. U. S. No. 364. Henry W. Potts, as assignee of the Chester Tube and Iron Company, plaintiff in error, *vs.* William H. Wallace. Filed May 28th, 1889.

SUPREME COURT OF THE UNITED STATES

HENRY W. POTTS, as Assignee of THE CHESTER TUBE AND IRON COMPANY,

Plaintiff in Error,

against

WILLIAM H. WALLACE,

Defendant in Error.

BRIEF FOR PLAINTIFF IN ERROR

SIDNEY WARD,
Attorney and of Counsel for Plaintiff in Error.

[Endorsed:] Supreme Court of the United States. Henry W. Potts, as assignee of the Chester Tube and Iron Company, plaintiff in error, *vs.* William H. Wallace, defendant in error. Assignment of error. Sidney Ward, attorney for plaintiff in error, 120 Broadway, N. Y. city. Filed in the office of the clerk of the U. S. circuit court for the eastern district of New York this 15th day of May, 1889.

112 Supreme Court of the United States.

HENRY W. POTTS, as Assignee of the Chester Tube and Iron Company, Plaintiff in Error,
against
WILLIAM H. WALLACE, Defendant in Error.
} Joinder in Error.

And afterwards, to wit, on the second Monday of October, in said term, the said defendant in error, by B. F. Tracy, his attorney, comes here into court and says that there is no error either in the record or proceedings aforesaid or in the giving of the judgment aforesaid. And he prays that the said Supreme Court, before the justices thereof now here, may proceed to examine as well the record and proceedings aforesaid as the matters aforesaid above assigned for error, and that the judgment aforesaid, in form aforesaid given, may be in all things affirmed, &c.

B. F. TRACY,
Attorney for Defendant in Error.

[Endorsed:] 1157. United States Supreme Court. Henry W. Potts, as assignee of the Chester Tube & Iron Company, plaintiff in error, *vs.* William H. Wallace, defendant in error. Joinder in error. B. F. Tracy, attorney for defendant in error, 35 Wall St., N. Y. city. Due service of a copy of the within joinder in error is hereby admitted this — day of ——, 188–. —— ——, attorney for plaintiff in error. To —— ——, attorney for plaintiff in error.

[Endorsed:] Sup. Court U. S. 1889, Oct'r term. No. 1157. Henry W. Potts, as assignee, &c., pl'ff in error, *vs.* Wm. H. Wallace. Joinder in error.

[Stamped:] Office Supreme Court U. S. Filed Sep. 27, 1889. James H. McKenney, clerk.

[Endorsed:] U. S. circuit court, east. dist. of N. Y. Henry W. Potts, assignee, &c., pl'ff in error, *vs.* William H. Wallace, def't in error. Record, writ of error, citation, and assignment of errors.

Endorsed on cover: Case No. 13,564. E. New York C. C. U. S. No. 364. Henry W. Potts, as assignee of the Chester Tube and Iron Company, plaintiff in error, *vs.* William H. Wallace. Filed May 28th, 1889.

41 146 US 689

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JAMES H. MCKENNEY
CLERK.

SUPREME COURT OF THE UNITED STATES.

HENRY W. POTTS, as Assignee of THE CHESTER TUBE AND IRON COMPANY,

Plaintiff in Error,

against

WILLIAM H. WALLACE,

Defendant in Error.

BRIEF FOR PLAINTIFF IN ERROR.

SIDNEY WARD,
Attorney and of Counsel for Plaintiff in Error.

DOUGLAS TAYLOR, Law Printer, 8 Warren Street, N. Y.

Supreme Court of the United States.

HENRY W. POTTS, as Assignee of the Chester Tube and Iron Company,
Plaintiff in Error,

against

WILLIAM H. WALLACE,
Defendant in Error.

Abstract or Statement of Case.

This action was originally brought in the Supreme Court of the State of New York for the County of Kings by Henry Potts, Jr., as Assignee of the Chester Tube and Iron Company, plaintiff, against William H. Wallace, defendant. The summons and complaint were served on the defendant in the City of New York on the 22d day of March, 1881. The answer of the defendant was served on the 17th day of May, 1881, and the reply of the plaintiff was served in August, 1881.

The complaint alleges in substance that the Chester Tube and Iron Company was a corporation created under the laws of the State of Pennsylvania, for the purpose of the manufacture of iron, steel or both or of any other metal or of any article of commerce from wood or metal

or both; that the principal office of the company was located in Chester, Delaware County, Pennsylvania; that the capital stock of the company was fixed at one hundred thousand dollars and divided into two thousand shares of fifty dollars each, and further alleges that the defendant subscribed for three hundred shares of the stock of the aggregate par value of fifteen thousand dollars. It further alleges that the defendant did not pay his subscription to the capital stock; that thereafter the corporation having become indebted to sundry persons, by its indenture of assignment dated the 14th day of September, 1880, assigned all its assets to Henry Potts, Jr., for the benefit of its creditors without preferences. That among the debts and obligations belonging to the company at the time of the assignment was this claim for the subscription of the defendant for fifteen thousand dollars; that the plaintiff had demanded payment from the defendant of the amount of his subscription, but that the same had not been paid, and demanded judgment against the defendant for fifteen thousand dollars, with interest thereon from the 11th day of October, 1880.

The defendant by his answer admits that he and six other persons associated themselves together to form a corporation by the name of the Chester Tube and Iron Company; that he has no knowledge as to whether said company was ever duly organized, and leaves the plaintiff to make such proof as he, may be advised. Defendant further admits that he, upon the formation of this company, subscribed for three hundred shares of the stock of the corporation of the par value of fifteen thousand dollars. In this connection the defendant also alleges that he offered to pay for and take said stock, but that the corporation refused to deliver it to him and notified him that they would not deliver it, nor was any stock whatever delivered to him, and no stock was issued to the

defendant. Defendant admits that payment of his subscription had been demanded of him by the plaintiff, but that he had not paid the same.

The other allegations in the complaint are denied and the defendant further alleges a counter-claim in favor of his firm of William H. Wallace & Company, alleging that the Chester Tube and Iron Company was indebted to his firm in the sum of seven thousand eight hundred and ninety-two and $\frac{11}{100}$ dollars, for which sum he demanded judgment against the plaintiff. The reply of the plaintiff denies the existence of this claim and denies that it is a claim in any way against the plaintiff, Henry Potts, Jr., who was the assignee of the Chester Tube and Iron Company. These pleading will be found on pages 2 to 7 inclusive.

After the service of the pleadings, and before the next term of the Circuit Court at which this cause could be tried was held, the plaintiff, Henry Potts, Jr., died. See folio 15, on page 7, and affidavit of Henry W. Potts as to the death of Henry Potts, Jr. Upon the affidavit of Henry W. Potts, showing that he had been substituted as assignee of the Chester Tube & Iron Company in the place of Henry Potts, Jr., deceased, at Special Term of the Supreme Court of the State of New York, held in the City of Brooklyn, on the 1st day of May, 1882, an order was granted substituting Henry W. Potts, as assignee of the Chester Tube & Iron Company, plaintiff, against William H. Wallace, defendant. As will be seen hereafter, in the meantime Henry W. Potts had been substituted as such assignee. The order of substitution will be found on page 9 of the record. After the substitution of Henry W. Potts as plaintiff, the supplemental pleadings were served. By the supplemental complaint, in addition to the allegations contained in the original complaint, an allegation was made of the death of Henry Potts, Jr., and of the appointment of Henry W. Potts, as assignee in his place.

The answer is substantially the same as the original answer, except that the defendant denies any knowledge as to whether the plaintiff, Henry W. Potts, succeeded to the rights of Henry Potts, Jr., as assignee of the said company. The supplemental pleadings will be found on pages 9 to 16 inclusive. Before this cause could be reached for trial at the Circuit Court in Kings County, the plaintiff Henry W. Potts, presented his petition to the Supreme Court, reciting the facts on which it was claimed that the plaintiff was entitled to have his cause removed and petitioned for a removal of this cause to the Circuit Court of the United States for the Eastern District of New York, that being the district in which the action in the Supreme Court of the State of New York was then pending. On this petition accompanied by the bond required by law, an order was granted at a Special Term of the Supreme Court of the State of New York, held in the County of Kings, on the 27th day of June, 1883, accepting the bond, surety and petition. Upon this order of removal the record was filed with the Clerk of the Circuit Court of the United States for the Eastern District of New York, and since that time the action was prosecuted in said Court. See pages 16 to 21 of record, showing petition, bond and order of removal.

This cause came on for trial at a Circuit Court of the United States for the Eastern District of New York, on the 8th day of May, 1888, Hon. E. Henry Lacombe, Circuit Judge, presiding. The jury was called and the case proceeded to trial.

On the trial of this action the plaintiff offered in evidence statutes of the State of Pennsylvania, showing the authority for the formation of corporations for business purposes in the State of Pennsylvania. Page 23. The testimony in this case, consisting of an exemplified copy of the charter of the Chester Tube & Iron Company, bearing date the

13th day of December, 1877, was introduced by the plaintiff's attorney, and will be found at page 23, at folio 51. By this paper it appears that the defendant William H. Wallace, subscribed for 300 shares of the capital stock of the company at fifty dollars each. Said exemplified copy shows the approval of the charter by the Governor of Pennsylvania, and the letters-patent issued, bearing date the 5th day of January, 1878. This certificate also shows the business of the corporation to be that of the manufacture of iron or steel, or both, or of any other metal, or of any article of commerce from wood or metal or both. The principle place of bnsiness of the company is stated to be at Chester, Delaware County, Pennsylvania.

The plaintiff's counsel then offered in evidence an exemplified copy of the record of the Chester Tube and Iron Company, recorded in the office of the Recorder of Deeds of Delaware County, with the certificate of the Secretary of the Commonwealth, showing the registration of this company in the office of the Secretary of State on the 5th day of January, 1878. (Page 24.) Then follows the testimony of William S. McManus, on page 24, showing that the defendant William H. Wallace was one of the directors of the company, and also one of the incorporators; that he commenced to be a director of the company from its organization, and continued to act as such until some time in July or August, 1880. The testimony of this witness also shows that in 1880 the company got into difficulties, and that in June of 1880 it was practically bankrupt.

The book of minutes of the company was presented by plaintiff's counsel. It showed that on the 3d day of August, 1884, a meeting of the corporation was held in the City of New York, at which a resolution was passed as follows:

A meeting of Board of Directors held this third day of

August, 1880, at the office of the company in the City of New York, all directors present.

The following resolution was presented and adopted:

Whereas it has become apparent that in order to enable this company to meet its liabilities that some indulgence on the part of its creditors is necessary.

Therefore resolved, that the president is authorized to negotiate for and effect an extension of the claims against the company upon such terms as he may deem most likely to make it meet its indebtedness, and in the event of his failing to accomplish such extension the president is authorized to execute, under the corporate seal, with his attestation, a deed of general assignment for all the estate and property of the compauy for the benefit of its creditors *pro rata* and without preference.

(Signed) JOHN SHOTWELL,
Secretary.

Page 24 and 25.

That, acting under this resolution, a meeting of the creditors was called, and the majority of them authorized the appointment of a trustee, and Henry Potts, Jr., was named as such assignee. That thereupon the president of the company, Mr. McManus, made an assignment of the assets of the company to Mr. Henry Potts, Jr., as trustee. (See pages 25, 26, 27.)

Plaintiff offered in evidence an exemplified copy of the deed of assignment made by the Chester Tube and Iron Company by its president, William S. McManus, under its seal, to Henry Potts, Jr., dated September 14, 1880, which transfer and conveyance to him as assignee of all the property of the corporation directed him to convert the same into cash and divide the same without preference among the creditors of the corporation. This assignment appears to be recorded in the Recorder's office of Delaware

County, Pennsylvania, September, 14, 1880, in Deed Book Z No. 4, page 213.

Plaintiff's counsel further offered in evidence the provisions of the statutes of Pennsylvania in regard to assignments by which provision is made for the substitution of an assignee to be made by the Court of Common Pleas. Following this an exemplified copy of the bond of Henry Potts, Jr., was introduced showing that Mr. Potts had filed his bond; further, that Mr. Potts took possession of the property and that he died in September, 1881. Page 26.

Plaintiff's counsel further offered in evidence, Section 23 on page 1418, of Brightley's Digest, by which provision is made for the appointment of a trustee by the Court in case of the death of the assignee.

Then follows the petition of George H. Potts to Thomas P. Clayton, Presiding Judge of the Court of Common Pleas of Delaware County, setting forth the death of Mr. Henry Potts, Jr., and praying for the appointment of Henry W. Potts, as Trustee in his stead, with a copy of the bond of Henry W. Potts, Jr., filed March 6, 1882. Page 26.

The plaintiff's counsel then offered in evidence, page 26 of Purdon's Digest, showing the jurisdiction of the Court of Common Pleas over the matter of the assignment of corporations, with general powers.

At this point counsel for defendant offered to read the proceedings of the meeting of the stockholders and also of the Board of Directors of August 20th, and also the proceedings of the Board of Directors on September 16th. This testimony was received subject to objection by the plaintiff's counsel which appear in this case. The testimony of Lawrence A. Tucker, who was sworn as a witness for the plaintiff, shows that the company in the summer of 1880, had become substantially insolvent and that

its debts were thirty thousand dollars more than its assets.

Counsel for defendant consents to take the statement of the witness without contradicting it that the assets of the company appear to be $250,000 and the liabilities $270,000 to $275,000. This witness further testified that Mr. Henry Potts took possession of the property as assignee and continued to manage it up to his death.

(Plaintiff's case rested.)

The counsel for defendant, in order to sustain the allegations in his answer, introduced testimony at length showing the number of shares in which the stock of the company was divided, which testimony appears on pages 27, 28 and 29. This testimony shows the division in which the stock was made on the books of the company and the transfers which were made from time to time.

Counsel for defendant also offered in evidence the minutes of the meetings of August 7th and 20th, for the purpose of showing that the authority given to the plaintiff to execute the assignment in this case has been revoked by the company, and that the president had no power to make the assignment. The resolutions in these proceedings, in regard to this matter, are found on pages 29, 30 and 31. It will be seen by reference to the proceedings of the meeting of August 20th, 1880, that the proceedings of the meeting of the Directors of August 3d, 1880, were approved and ratified and the president authorized to execute the general assignment after a mortgage and assignment of a lease to A. B. Wood was duly executed and delivered. These resolutions will be found to be on page 31, folio 66.

At the meeting of the directors of the company held on the 16th day of September, 1880, a resolution was adopted

disapproving the act of Mr. McManus as president of the company in executing the deed of assignment.

All this testimony showing the action of the Board of Trustees, after the meeting of August 3d, 1880, in which the assignment by the president was authorized, was objected to by the counsel for the plaintiff and received subject to his objection.

The defendant further offered testimony both by Mr. Shotwell, who was the secretary, and by Mr. Wallace and Mr. Bispham, for the purpose of showing that Mr. Wallace, the defendant, on several occasions asked that his stock be issued to him and offered to pay for it.

This testimony was objected to by the counsel for the plaintiff, pages 23 to 33, and at other points on the examination, on the ground that it is not within the power of the Board of Directors, and certainly not within the power of an officer, to negotiate in any way with the stockholders in regard to whether they shall, or shall not, have their stock as against an assignee for the benefit of creditors. This objection was overruled and an exception taken by plaintiff's counsel. This objection was repeated several times on page 34 of the record.

The testimony of Mr. Shotwell and Mr. Wallace in regard to the offer of the defendant to pay for stock appears on pages 33 to 40. It appears from the testimony of Mr. Wallace on pages 39 and 40, on his cross-examination, that Mr. Wallace was a director of the company and continued to be until sometime in 1880, when he resigned as Director. See his testimony on page 40, folio 82.

Defendant's counsel offered in evidence By-Laws 14 and 15 of the company in regard to the power of the president and treasurer to use the seal of the company. Exception by plaintiff. See page 40.

William S. McManus, called as a witness for the plaintiff, page 40, gives his version of the offer of Mr. Wallace to purchase his stock, and Mr. Wallace on page 86 is again recalled to show the condition of the company, and further testimony is shown indicating the amounts paid in on capital stock and the transfers that were made of the different shares. It appears that Mr. Wallace resigned as director at a meeting of the company held on the 6th of July, 1880. See page 46.

The changes in the capital stock of the company are shown on page 45.

This closed the testimony in the case, and at the close of the testimony the defendant requested the Court to direct the jury to find a verdict for the defendant. A similar request was made by counsel for the plaintiff; that the Court direct a verdict in favor of the plaintiff. Plaintiff's motion to the Court to direct a verdict in his favor was denied by the Court and plaintiff's counsel excepted, and the Court, on defendant's motion, directed a verdict in favor of the defendant, which ruling was excepted to by the plaintiff. These requests of rulings will be found on page 46.

Plaintiff's counsel made a motion for a new trial on the minutes, which motion was denied and plaintiff's counsel duly excepted.

The term of the court was extended for sixty days. See order dated May 9, 1888, on page 22.

The bill of exceptions as settled was duly filed on the 5th day of July, 1888. See page 47.

Assignments of Error.

The assignments of errors are found on pages 51 to 53. The errors by which the plaintiff in error claims that the judgment in this action should be reversed arose upon exceptions taken to testimony offered by the counsel for the defendants; also to the refusal of the Court to direct a verdict for the plaintiff and to the direction by the Court of a verdict in favor of defendant. These assignments of error may be grouped under the following heads:

FIRST.—The alleged error of the Court, being the three assignments of error as first set forth, to wit, in the admission of evidence of the proceedings of meeting of the stockholders, August 12, 1880, and of the meetings of the stockholders and of the Board of Directors of the Company, held on August 20, 1880 (see pages 30 to 32), and also the ruling of the Court in receiving the minutes of the meeting of the Board of Directors of Sept. 16, 1880, which were objected to by the plaintiff, and to the introduction of which evidence the plaintiff's counsel excepted.

SECOND.—The next group includes the 4th to the 10th assignments of error, being for alleged error on the part of the Court in admitting the testimony of John Shotwell, the testimony of the defendant Mr. Wallace, the testimony of the witness William Bispham as to the offer of the defendant to the officers of the Company to pay for and receive his certificates of stock. This group also includes an exception to the testimony of the defendant Wallace in regard to his action at the meeting of the Board of Directors held July 6th, 1880.

THIRD.—The 3d grouping of assignments of error includes the 11th and 12th assignments found in the record

on page 53, being exceptions to the ruling of the Court admitting in evidence by-laws 14 and 15 of the Company.

FOURTH.—The 4th grouping relates to the ruling of the Court as set forth in the 13th, 14th, 15th and 16th assignments of error, in which the Court denied the motion of plaintiff's counsel to strike out the testimony of the defendant Wallace in regard to his action at the director's meeting held on July 6th, 1880, and in admitting the testimony of the witness John Shotwell in reference to the manner in which he kept the minutes of the meeting of July 6th, 1880.

FIFTH.—The next assignment of error upon which the plaintiff in error relies is the 16th assignment of error contained in the record, page 53, which alleged error consisted in receiving the testimony of the defendant Wallace as to whether he voted on any of the questions at the meeting of the Board on July 6th, 1880.

SIXTH.—The next assignment of error upon which the plaintiff in error relies is the 17th, and is found on page 53, in which it is claimed that the Court erred in refusing to direct a verdict in favor of the defendant.

SEVENTH.—The next assignment of error upon which the plaintiff in error relies is the ruling of the Court as set forth in the 18th assignment of error (page 53) that the Court erred in directing a verdict in favor of the defendant, to which error the plaintiff's counsel duly excepted.

EIGHTH.—The next assignment of error is general in its character, being the 19th, that the Court erred in refusing to grant a new trial upon motion made by plaintiff's counsel upon the minutes of the trial, to which refusal plaintiff's counsel duly excepted.

POINTS FOR PLAINTIFF IN ERROR.

Point First.

It is submitted that at the close of the plaintiff's case he had proved a complete cause of action against the defendant for the amount of his subscription. He had proven the organization of the Chester Tube and Iron Company, the fact of the subscription by the defendant for 300 shares of the capital stock of the par value of $15,000; that the company conducted business for a period of several years; that the defendant down to the date of his resignation had been and had acted as a director of the company; that in the summer of 1880 the company became embarrassed and was insolvent. He had also proven the action of the Board of Directors of the company authorizing the execution of an assignment for the benefit of all the creditors *pro rata*. This assignment had been executed by the president of the company under its corporate seal and had been duly recorded. Henry Potts, Jr., the assignee, had entered upon the discharge of his duties and had taken possession of the property and had found the subscription of the defendant to the 300 shares of the capital stock as one of the assets. The fact of the demand of payment of this subscription was admitted. The death of Henry Potts, Jr., was shown; the fact of the appointment of Henry W. Potts as substituted trustee or assignee in his stead; and the substitution of Henry W. Potts as plaintiff in this action.

All of the evidence to sustain plaintiff's claim was received without objections, except the objection made to the testimony in regard to the meeting of August 6, 1880, which was held in the City of New York, the ground of the objection being that the company is a Pennsylvania corporation, and the proceedings offered in evidence are

what purpots to be proceedings held in New York (see fol. 53 of the Record), and the objection to the receipt of the deed of assignment which was taken by defendant's counsel (see fol. 54 of the Record).

No other objection being taken to the testimony of plaintiff, the facts above alleged must be assumed to be absolutely proven.

The power of a Pennsylvania corporation to make an assignment for the benefit of creditors was sustained in the case of Dana *vs.* The Bank of the United States. 5th Watts & Sergeant's Reports (Penn.), page 223.

Point Second.

The testimony that was offered by Mr. Wallace, Mr. Shotwell and Mr. Bispham, found on pages 34, &c., in no way discharged his liability under his subscription. The subscription of Mr. Wallace to the stock of this company was a subscription for the benefit of whoever should thereafter deal with the company and become its creditors; and having subscribed and agreed to take and pay for the stock, it was not in his power, nor in that of the Board of Directors, except upon the receipt of an equal amount from some other party who should take the place of Mr. Wallace, to discharge him from his liability upon this subscription. His liability being for the benefit of the creditors of the company created a debt against him which could only be discharged by absolute payment, and his offer to pay and the refusal of the officers to accept his money, assuming such to be the fact, in no way released him from his liability so far as the creditors of the company are concerned. He had become a stockholder. Parties dealing with the corporation must be presumed to know

of his subscription, and also of his responsibility, which is unquestioned, and his subscription formed part of the basis of the credit of the corporation. His offer to pay without actually tendering the money so that it came into the hands of the corporation, did not discharge his liability, and the evidence that was offered by him and on his behalf in this respect was erroneously received, and for that reason the judgment in this case should be reversed.

Point Third.

The Court erred in refusing to direct a verdict in favor of the plaintiff. The organization of the corporation being proved, the subscription of the defendant, appearing from his admission in the pleadings, the fact of the insolvency of the company, the execution of the assignment to Henry Potts, Jr., to which the plaintiff in this action succeeded, entitled the plaintiff to a verdict for the amount of his subscription, and the Court should have directed a verdict in favor of the plaintiff for the sum of fifteen thousand dollars, with interest from the time of the demand made upon him by Henry Potts, Jr., which was in August, 1881. There can be no question of the right of the plaintiff to maintain this action.

Point Fourth.

Although the defendant testifies that he offered to pay for the amount of his subscription and demanded certificates of the capital stock, still it is evident from his testimony that the refusal of the officers to receive

his money and issue the stock did not cause him to take any steps to terminate his relations with the company. His first demand for the stock appears to have been made in 1879 (pages 33 to 37), at a time when, as he testifies, he believed this stock to be very valuable. His offer, it seems, was repeated from time to time, and several times after the refusal, as he testifies, of the officers to accept his money and issue the stock; but he continued to act as a director of the company until the Summer of 1880, and, according to his own testimony, did not cease his relations with the company until he found that it was in an embarrassed condition and that his stock might not be valuable.

See page 37, fols. 77 and 78.

"I made no tender after the concern got into trouble."

See also page 38, at top of page, where defendant, in answer to a question by the Court, said that he did not tender money and demand his stock after July 6, 1880.

See also page 42, folio 86, where witness says he was ready to take the stock and pay for it so long as he considered it good.

Point Fifth.

The position taken by the counsel for the defendant in error, that the refusal of the officers to issue certificates of stock released him from his liability on his subscription, is untenable. The certificate itself is of no importance except as an evidence of ownership of stock; it is not property in itself; it does not create any right in the holder of it, and it is not at all essential to the title of the holder of capital stock that he should have a certificate issued to him by the officers of the company. There is nothing in the by-laws, as proven or as appears in the record, that

renders it essential that certificates of stock should be issued. In point of fact, as will be seen by the testimony, certificates of stock were issued to subscribers. (See pages 28–29, fols. 59 and 62.) The defendant's interest in the company had its inception when he made his subscription for the capital stock, and having made that, and being recognized as a stockholder, his interest in the company only depended on the payment of his subscription into the treasury of the company. If this had been done, even though no certificate had been issued, his rights would have been preserved as effectually as though certificates had been issued.

See Hawley *vs.* Upton, 102 U. S., 314, page 316.

Wheeler *vs.* Millar, 90 N. Y. Reports, 353.

Opinion of Finch, J., page 357.

Point Sixth.

The principal claim of the defendant is the claim that the defendant, during the continuance in business of the Chester Tube and Iron Company, offered on several occasions to pay for and take his stock, and the effort was made to show that by the act of the president of the corporation the corporation had in fact refused to accept the subscription of the defendant for his capital stock, and to issue to him the certificates of stock therefor, and it is claimed that this discharges him from liability under his subscription, on the theory that this is a simple matter of contract between the defendant and the company. If it could be maintained at all that upon good consideration the corporation could release him from his obligation to pay his subscription to the capital stock, it is

submitted that such an agreement could not be made by the president, who certainly had no power to make any agreement by which defendant became discharged, nor could he be discharged even by the action of the board of directors, so as in manner to affect the rights either of an assignee in bankruptcy or of the plaintiff in this case, who stands in the position of a trustee for the benefit of the creditors of the corporation. This question has been repeatedly passed upon by this Court in such a clear and decisive manner as to leave no question whatever as to the position of the Court upon the subject.

The leading case upon the liability of stockholders in similar cases is that of Sawyer *vs.* Hong, 17 Wallace, 610.

Under these decisions the Courts have held distinctly, that it is not within the power of a corporation to make any agreement by which the rights of creditors can be affected.

The plaintiff in this action being a trustee of the creditors of the corporation, it became his duty to collect all the assets which belonged to the company, and to apply them to the payment, so far as they would go, of the debts of the corporation. And no agreement by which the creditors were deprived of the benefit of the defendant's subscription to the capital stock could be binding as against them, or as against the assignee. This, it seems to us, disposes entirely of the question raised by the defendant in this case. The defendant's liability to the creditors of the company became fixed upon his original subscription to the capital stock. He became a stockholder on the making of the articles of association. He allowed the company by this act to hold out his subscription, which became an asset of the company and liable to pay debts.

Sawyer *vs.* Hoag, 17 Wallace (84 U. S.), 610.

See head-notes as stating the principles decided in the case.

In the opinion of Mr. Justice Miller, page 619, it is stated: "And on this consideration one of the main arguments in which the appellant seeks to reverse the decree stands. He assumes that the assignee in bankruptcy is the representative of the corporation, and can assert no right which it could not have asserted. The weakness of the argument is in this assumption. The assiguee is the representative of the creditors as well as of the bankrupt. He is appointed by the creditors. The statute is full of authority to him to sue for and recover rights and credits where the bankrupt could not have sustained the action, and to set aside as void transactions by which the bankrupt himself would be bound. All this is, of course, in the interest of the creditors of the bankrupt. * * * * * Though it be a doctrine of modern date, we think it now well established that the capital stock of a corporation, especially its unpaid subscriptions, is a trust fund for the benefit of the general creditors of the corporation."

The rest of the opinion, to the whole of which attention is called, follows the same line of argument.

Hawley *vs.* Upton, 102 U. S. Sup. Ct., 314, Head Note. A, by his bond, acknowledged the receipt from an insurance company of ten shares of its capital stock and agreed to pay $200 therefor in instalments, one-fourth on receipt of the stock certificates and the remainder in three equal amounts at 3, 6 and 9 months from January 7, 1871, the date of the bond. He paid on executing it $25, and his name was entered as a stockholder on the books of the company. The certificate was not delivered or demanded. In 1872 the company became bankrupt. Held: That the assignee is entitled to recover of A the unpaid instalments.

Chief Justice Waite (page 316), in delivering the opinion of the Court, says: "It cannot be doubted that one who has become bound as subscriber to the capital stock of a

corporation must pay his subscription if required to meet the obligations of the corporation. *A certificate in his favor is not necessary to make him a subscriber.* All that need be shown, so far as creditors are concerned, is that the subscriber shall have bound himself to become a subscriber to the fund which the capital stock of the corporation represents. If such an obligation exists, the Courts can force the contribution when required. After having bound himself to contribute, he cannot be discharged from the obligation he has assumed until the contribution has been actually made, or the obligation in some lawful way extinguished."

County of Morgan *vs.* Allen, 103U. S., page 498, Head Note. The Court re-affirms the doctrine announced in Sawyer *vs.* Hoag (17 Wallace, 619), and subsequent cases, that the assets of an insolvent company, including the moneys due from a shareholder in his subscription to its capital stock, constituted a fund for the payment of its creditors, and that he cannot, to their prejudice, be released from his liability by any arrangement between it and him which is not fair and honest and for a valuable consideration. The doctrine is applicable when the debt created by the subscription of a county is evidenced by bonds, and they were surrendered to it in fraud of the rights of creditors, although the surrender was made pursuant to a consent decree in a suit to which they were not parties.

On page 508, in the opinion of the Court by Mr. Justice Harlan, this doctrine is fully stated at length. Attention is called to this opinion.

The release of a subscriber can only be effected by fair and honest dealing "and for a valuable consideration."

In the case at bar, the defendant certainly paid no consideration by which he could claim to be discharged from his subscription to the capital stock of the Chester Tube

and Iron Company. The defendant became a stockholder in the company on his subscription to the capital stock and the filing of the articles of association.

Morawetz on Corporations, 2d Ed., Sec. 59, pages 57 and 58.

The same rule of law is held in Pennsylvania where this cause of action arose.

See Bedford Railroad Co. *vs.* Bowser, 48 Pa. State, 29.

In this case the directors undertook to cancel the subscription of subscribers to the corporate stock.

Held: That they had no power to do so. See opinion of Strong, J., pages 34–37.

On page 37 the Court says: "The chief error, however, in this record and the one which was most fatal to the plaintiff's case was the instruction given by the Court to the jury, that if the company had assets sufficient to pay its debts, the cancellation of the stock of these 266 subscribers on the 11th January, 1861, was valid and released the defendant. From this we entirely dissent, &c."

The power of the directors to release a subscriber is distinctly denied.

Garrett *vs.* Dillsburgh and Mechanicsville R.R. Co., 78 Pa. State, 465.

Action on subscription to stock. Defendant subscribed for five shares.

Head Note. (2.) The act of April 4, 1863, authorized the formation of railroad corporations by persons subscribing articles of association, which are to be filed with the Secretary of the Commonwealth, &c., and become the charter of the company, but not until $9,000 per mile have been subscribed and ten per cent. paid in good faith, no subscription to be taken without payment of ten per cent. Garrett subscribed the articles of such corporation but did not pay the ten per cent. The articles were filed and the

certificate of charter issued. In a suit against Garrett for his subscription after issuing the certificate, held: That he was liable although he had not paid the ten per cent.

(5.) If a subscriber suffers his name to remain and the articles to be filed, his obligation is final, and he cannot set up his omission against his associates. The opinion of Chief Justice Agnew, pages 467 and 468, fully sustains the head notes.

The same principle is declared in other cases in the Supreme Court of the United States.

See Sanger *vs.* Upton, Assignee, 91 U. S. S. C., page 56.

Webster *vs.* Upton, same Vol., page 65.

Scovil *vs.* Thayer, 105 U. S. S. C., page 143. See opinion at page 154.

Upon the question as to the relation which the defendant Wallace bore to the company in his subscribing the articles of association, and that he became a stockholder without any certificate of stock being issued, see Lake Ontario, Auburn & N. Y. R.R. Co. *vs.* Mason, 16 N. Y., 451.

Head Note. A subscription of stock made before the incorporation of the company is obligatory upon the subscriber, although he made no cash payment whatever. The right to membership is a sufficient consideration for the subscriber's liability, and he cannot revoke the subscription. Also see opinion of Court, page 463.

Also Wheeler *vs.* Millar, 90 N. Y. Reports, 354.

The opinion of the Court by Finch, J. (page 357), is as follows: "The defendant is sued as a stockholder of the Mallary Paper Bag Manufacturing Company, a corporation organized under the General Manufacturing Act, and is sought to be made liable for an indebtedness of that corporation to plaintiff, upon the ground that its capital stock had not been fully paid in. The latter fact is un-

disputed, but it is answered that the defendant was not a stockholder, and not liable to the plaintiff as such. The referee has found as a fact that the defendant was a stockholder, and upon evidence which warranted that conclusion. It was proven that he was one of the original corporators, and signed the articles of incorporation; that he subscribed for fifty shares of the stock; although he had never paid for them; that he was a trustee of the company, and acted as such, thus recognizing his ownership of the stock, without which he could not have held such an office; that he was secretary of the company and actively engaged in the management of its affairs; that he appeared upon the stock book of the corporation as a stockholder therein to the extent of fifty shares of the stock; and that although called upon to produce such book he failed to do so, alleging it was lost. It is now insisted that all these facts establish only that he was a subscriber to the stock, and not a stockholder, and that he could only become the latter by the issue to him of a certificate, or by actual payment for the stock. But the certificate is only evidence of ownership. Its issue and acceptance show an acknowledgment of that fact on both sides, but such acknowledgment may be equally inferred from other facts in the absence of a certificate. Nor is payment indispensable. The statute which underlies this action distinctly recognizes that there may be stockholders in a company whose capital has not been paid in, and fastens upon them a liability as such by reason of that very non-payment.

See on same points: The Buffalo & N.Y. City R.R. Co. *vs.* Dudley, 14 N.Y. Rep., 337.

Burr *vs.* Wilcox, 22 N.Y., 551.

To the same effect Hawley *vs.* Upton, 102 U.S S.C. page 314, above cited.

Also see Morawetz on Corporations, 2d Ed., Vol. I, Sections 46, 56, 61, 128, 148, 173.

It is needless to cite further authorities on this question than those already cited, as the whole current of authority is to the effect that the rights of the shareholders are not affected by the question as to whether a certificate of stock has been issued to him or not. His right to an interest in the company to the extent of the shares he claims to hold is a right entirely independent of the certificate, which is only an evidence of ownership, and not the thing which is owned.

If the defendant had shown that the alleged refusal to accept his offer to pay his subscription was such that he might have been discharged from his liability to the company, his continuance in the Board of Directors and his action in attending the meetings of the stockholders was a waiver to any such right to a discharge, and by his own acts he continued to retain his relation of such stockholder and director. He never treated the refusal of the President as a termination of his relation of stockholder in the company, nor did he ever in any manner waive his rights as such stockholder. His offer to take the stock was made in 1879 (see testimony, pages 62 and 63), and he attended the meetings of stockholders and the meeting of directors in January, 1880, and did not tender his resignation as director until July 6, 1880, after the company had been embarrassed (see testimony at above cited point). As long as the company was supposed to be prosperous he maintained his relations to it as a director and stockholder, and it was not until the trouble came that he sought to get out of his relations to it as a director.

He never in any way waived his right to demand his stock.

It is submitted that he is estopped as against the company (and certainly as against the plaintiff as assignee

and trustee for creditors) to assert that he has been released from his obligation to pay his subscription to this capital stock.

In Morawetz on Corporations, above cited, the author at Section 308, lays down the rule in regard to those who act as shareholders being held liable as shareholders.

He says that justice to the shareholders in a corporation demands that every person who enjoys the privileges of membership, and may be held by the company to all the liabilities of membership, although formalities prescribed by the charter have not been observed.

Point Seventh.

It was claimed on the trial of this action that by the action of the Board of Trustees of this corporation the power of the corporation to make the assignment, in question, was revoked. This position is untenable. By reference to page 6 of the testimony it will be seen that at a meeting held on the 3d of August, 1880, it was provided that in the view of the company if the president should be unable to negotiate and effect an extension of the claims against the company he should execute a general deed of assignment of all the estate and property of the company for the benefit of its creditors *pro rata* and without preference. This resolution was not repealed and the authority given is ample. The assignment bears date the 14th day of September, 1880. On the 20th day of August, 1880, a meeting of the stockholders of the company was held in the City of New York. This meeting is recited at length on pages 35, 36 and 38; also a meeting of the Board of Directors of the company is shown on page 39. The resolution passed on the 20th day of August contemplates the execution and delivery to A. B. Wood, as

trustee, etc., of a bond and mortgage for an amount in which it was claimed the company was indebted to him. That resolution, after providing for the mortgage to Wood, also provides for the execution of a general assignment in accordance with the resolution of the 3d of August. The contention of the defendant in reference to this matter is that whereas in fact no mortgage was executed to Mr. Wood, therefore the assignment of the company to Mr. Potts, under the resolution of August, cannot be sustained. Now, it is submitted by the plaintiff that the defendant is in no condition to raise this question. Whether the mortgage to Wood was executed or not does not in any way affect the defendant's liability. Nor does it in any way affect the claim of the plaintiff as the assignee of the company. The resolution of August 20th did not repeal the resolution of August 3d, but merely modified it. The only effect of the meeting of August 20th was to make a preference in favor of Mr. Wood, a creditor of the company. The only person who could take advantage of this provision was Mr. Wood himself. The only effect of the provision in his favor would be that if this provision was valid, he would be entitled to claim that his debts, the amount of which seems to have been admitted, should first be paid out of the assets of the company. This in no way affects the defendant. It does not impair his rights, nor limit the liabilities.

Another view of this question which is submitted to the Court is this: On the passage of the resolution of August 3d, 1880, provision was made by the Board of Directors, and it will be borne in mind that at this meeting all the directors of the Company were present, by which provision was made in favor of all the creditors, unless the President could succeed in obtaining an extension of time from the different creditors. It is submitted that this created a trust in favor of all the creditors *pro rata* which could

not be revoked by any subsequent act of the corporation. It was on official act which secured to all the creditors in a certain contingency a just share of all the assets, and, being an act in their favor and for their benefit, it could not be subsequently changed by any action of the Company giving a preference to any creditor.

The mode of the execution of this assignment, which was objected to by the counsel for the defendant, on the ground that it was in conflict with the By-Laws, was amply sufficient to enable the President to execute such an assignment as would be binding upon the Company. As above noted it will be seen that all the directors of the Company were present at that time, and if all the directors, acting in unison as they did, adopted this resolution, authorizing the President to execute the assignment under the seal of the Company, it was equivalent to a suspension of the By-Laws for that purpose, which they certainly had power to do, being all present. Therefore, it is submitted that the execution of this assignment is made in proper form.

Eighth Point.

It is submitted finally that on the whole testimony in this case the plaintiff was entitled to a verdict for the amount claimed, and that this Court should either order judgment in favor of the plaintiff for this amount or direct a new trial.

SIDNEY WARD.
Attorney and of Counsel
for Plaintiff in Error.

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CLERK.

Supreme Court of United States.

HENRY W. POTTS, AS ASSIGNEE, ETC.,
Plaintiff in Error,

vs.

WILLIAM H. WALLACE,
Defendant in Error.

BRIEF FOR DEFENDANT IN ERROR.

B. F. TRACY,
Attorney for Defendant in Error.

Supreme Court of the United States.

HENRY W. POTTS, as Assignee, &c.,
Plaintiff in Error,

vs.

WILLIAM H. WALLACE,
Defendant in Error.

Defendant's Points.

STATEMENT OF FACTS.

The Chester Tube and Iron Company was organized under the General Corporation Law of the State of Pennsylvania in December, 1877 (fol. 51).

Its capital stock consisted of 2,000 shares of the par value of $50 per share. The defendant with six others subscribed for its capital stock. The defendant subscribed for 300 shares and was named as one of the directors in the charter. The number of shares subscribed for by the others, the amounts paid by the subscribers respectively on account of their subscriptions and the various transfers of stock made after the organization of the corporation appear at folio 92.

The business of the corporation at first was prosperous and it continued prosperous for about two years. No demand was made upon the defendant for the payment of the money due upon his subscription until after the assignment made by the president of the corporation hereinafter referred to, and no certificate of stock was ever delivered to the defendant. On several occasions during the year

1879, when the corporation still continued to be prosperous, the defendant demanded his stock from the treasurer of the corporation and offered to pay for the same. The treasurer refused to receive the defendant's money or to deliver any stock to him, and informed him that according to the orders of the president he could not have any stock in the company. After making a number of fruitless attempts during the year 1879 to pay for his stock and obtain his certificate (fols. 75–80), the defendant accepted the situation in which the corporation had placed him by its refusal to complete the contract of subscription on its part. At a meeting of the Board of Directors, held on July 6, 1880, the defendant resigned as a director of the corporation. There were no meetings of the Board of Directors between January 26 and July 6, 1880 (fol. 89).

In August, 1880, the assets of the corporation amounted to $250,000 and its liabilities exceeded its assets by from $20,000 to $25,000 (fol. 58). On August 3, 1880, the preamble and resolution printed at folio 53 were adopted by the Board of Directors. This resolution instructed the president to negotiate for and effect an extension of the claims against the company upon such terms as might seem to him proper, or failing to accomplish this result, it authorized him to execute under the corporate seal a general assignment of all the estate and property of the corporation for the benefit of its creditors without preference.

On August 12th the president reported at a special meeting of the stockholders that he could obtain an extension from one of the company's creditors only by executing a mortgage in favor of such creditor on the company's property. This proposition was rejected (fol. 63).

On August 20th another meeting of the stockholders was held. The minutes of this meeting are printed at folios 64–67. These minutes state the indebtedness of the company at that time to be $278,183.79, and its assets $248,751.71. The president reported that a meeting of the creditors had been held which had adjourned without action. A. B. Wood, one of the stockholders who subscribed

for 1,000 shares of the company's stock and had paid only $38,632.24 on account of his subscription (fol. 92), presented claims against the company for moneys loaned by him amounting to $28,470. He offered to purchase from the company certain machinery, &c., for $12,260, cancelling his claims to this extent, and the stockholders unanimously resolved to secure the balance of his claims by a mortgage. The stockholders then ratified the action taken by the directors on August 3, 1880, as above stated, except that they directed that the mortgage and assignment to Mr. Wood should be executed and delivered before the execution of the general assignment.

At a meeting of the Board of Directors, held on August 20th, the proposed sale to Mr. Wood and the execution of the mortgage above referred to were approved. On September 14th the president executed a general assignment to Henry Potts, Jr., under the seal of the company (fol. 54). It was not signed by the secretary and treasurer. The papers which the stockholders and directors had instructed the president to execute and deliver to Mr. Wood before the execution of the general assignment were not executed, and to this extent the president acted in the premises without authority. On September 14th, as soon as the other directors learned of the unauthorized assignment made by the president, a meeting of the Board was called for September 16th, the minutes of which are found at folios 68–71. At this meeting the action taken by the president was repudiated by all the other directors in very vigorous language, and a resolution was passed removing him from office and electing a successor.

Henry Potts, Jr., died in September, 1881, and the plaintiff, Henry W. Potts, was substituted as assignee in his place by the Court of Common Pleas of Dauphin County, Pennsylvania (fol. 16).

There is no statute in Pennsylvania under which the plaintiff can claim greater rights against the defendant than those which he may have under the general principles of the common law and equity.

The present action is not an action in equity. It is an

action at law for plaintiff to recover the sum of $15,000, alleged to be due on the defendant's stock subscription.

The plaintiff's complaint was dismissed.

The plaintiff ought not to succeed on this appeal for the following reasons:

Point First.

All duties and obligations imposed upon the defendant by his subscription were fully discharged and canceled by the refusal on the part of the Company, while it continued solvent, to receive the payment and performance tendered.

I.

The contract of subscription between the defendant and the Company was a mutual contract and gave rise to mutual obligations and duties.

That the subscription, at its date, was a valid contract, is not disputed. The consideration was "the obligation "resting on the corporation to issue stock to the defendant "to the amount of his subscription and his consequent "power to control the corporation to the extent of his "stock."

Richmondville Union Seminary vs. *MacDonald*, 34 *N. Y.*, 379, 381.

The subscription is not a unilateral contract, and the "subscribers are bound only when the Company is "bound."

Parker vs. *North. and Mich. R. R.*, 33 Mich., 23.

"When a stockholder subscribes for stock, and his sub-"scription is accepted, it is not only the right of the bank "to call in the money, but it is the right of the stock-"holders to pay it."

Marsh vs. *Burroughs*, 1 *Woods*, 465, 468.

"By the joint action of the corporation and the sub-
"scriber for its stock, he may become the owner of a
"given number of shares thereof."

Burrall vs. *Bushwick R. R.*, 75 *N. Y.*, 211, 216.

"The subscription is an ordinary contract to sell and
"purchase, and is affected by the incidents affecting such
"contracts."

Pitts. & Conn. R. R. vs. *Graham*, 36 *Pa. St.*, 79.

"A subscription to stock is a contract between a sub-
"scriber and the Company, and is governed by the same
"rules of honesty and fairness in its enforcement that
"apply to ordinary contracts."

Custar vs. *Titusville G. & W. Co*, 63 *Pa. St.*, 387.

"A subscription is a contract to which the subscriber
"and the corporation are parties."

Melvin vs. *Hoitt*, 52 *N. H.*, 67.

II.

The contract of subscription being one of "sale and purchase" the obligation on the part of the defendant to pay his subscription was fully discharged at the time he tendered performance, and the same was refused.

"Upon tendering the property and after giving the
"buyer a reasonable time to accept the property and pay
"for the same, the seller may regard the contract as
"abandoned by the purchaser, he being put in default by
"his refusal to pay."

Westfall vs. Peacock, 63 *Barb.*, 213.
Des Arts vs. Leggett, 16 *N. Y.*, 582.
Billings vs. Vanderbeck, 23 *Barb.*, 546.
Slingerland vs. Morse, 8 *Johns.*, 370.

III.

The defendant took all necessary steps to release himself from liability as a stockholder. In view of the action taken by the treasurer and president, a formal tender by the defendant of the amount of his subscription was not necessary. The defendant on several occasions demanded his stock of the treasurer and offered to pay for the same, but in every instance the treasurer, acting under the instructions of the president, refused to issue the stock (see fols. 72, 75–77, 80).

In Hills v. National Albany Exchange Bank, 12 *Fed. Rep.*, 95, this Court said: "It is a general rule that when tender of performance of an act is necessary to the establishment of any right against another party, the tender or offer to perform is waived or becomes unnecessary when it is reasonably certain that the offer will be refused—that payment or performance will not be accepted. * * * * Bennet *v.* Hunter, 9 Wall., 326; Tacey *v.* Irwin, 18 Wall., 549; Atwood *v.* Weems, 99 U. S., 183."

In Currie v. White, 45 *N. Y.*, 830, Rapallo, *J.*, said: "A tender of the money was not necessary. The payment and delivery were to be simultaneous. The offer and readiness to pay were sufficient; by failing to respond to that offer the defendant dispensed with the necessity of a formal tender."

See, also, Woolner v. Hill, 93 *N. Y.*, 576.

It was within the province of the president and treasurer of the corporation to issue the stock, they being authorized by the by-laws to sign all certificates of stock, and their refusal to issue stock was the refusal of the properly authorized agents of the corporation.

IV.

It is conceded that the general rule of law in regard to unpaid stock subscriptions is that "unpaid subscriptions to stock are assets, and have frequently been treated by

courts of equity as if impressed with a trust *sub modo* in the sense that neither the stockholders nor the corporations can misappropriate subscriptions so far as creditors are concerned."

But the equities of creditors are not regarded to the exclusion of all other equities. In the absence of statutes creditors may have equitable claims against stockholders, but not legal rights.

Cases may and do arise where the right of a subscriber to be released from his obligation is paramount to any rights of creditors.

We do not doubt that a subscriber to the capital stock of the company cannot be discharged from the obligation which he has assumed until payment has been actually made, or the obligation to pay has been extinguished in some lawful manner. And we further concede that where the obligation to pay exists, any arrangement between the company and its debtor, by which a fictitious payment is attempted to be substituted for an actual payment, is a fraud upon creditors, and may be disregarded by a receiver in bankruptcy, and the payment of the balance actually due enforced.

There is no reported case that goes beyond this.

Wherever a pretended payment has been set aside and disregarded, it has been put on the express ground that the alleged payment was a fiction, and made in fraud of the creditors of the corporation.

No such question is involved in the case at bar.

The defendant was a subscriber for the stock of the corporation; payment of this subscription could not be enforced except by tender of the stock.

The promise of the corporation to deliver the stock was the consideration of the defendant's promise to pay.

The contract was executory.

When the defendant offered to pay and demanded his stock and the corporation refused to deliver it, the corporation violated its contract and the defendant was discharged therefrom.

At the time of the bankruptcy, the defendant had ceased

to be a subscriber for the stock. He was under no obligation whatever to the corporation. Of course, if it could be alleged that this was a mere device for the purpose of relieving the defendant from his obligation, a different question would be presented.

No such thing is pretended.

This distinction is pointedly made by Grover, *J.*, in Mills *vs.* Stewart, 41 N. Y., 386.

It has been repeatedly held by the Court of Appeals, in the State of New York, that a subscriber to the capital stock of acorporation, whose stock has been forfeited for the non payment of installments due thereon, is not liable for the debts of the corporation, even although the debt was contracted while he was a stockholder, and prior to the forfeiture of his stock.

Mills vs. *Stewart*, 41 *N. Y.*, 386.
Small vs. *Herkimer Mfg. Co.*, 2 *N. Y.*, 330.

In conclusion we repeat, that the promises of the defendant and of the corporation were mutual and dependent—the defendant could not demand his stock without offering to pay, nor the company demand his subscription without tendering the stock.

An offer to perform, made in good faith by one party and refused by the other, puts an end to the contract and discharges the other from any obligationto perform.

For the Court to hold that the defendant is bound to pay notwithstanding the refusal of the Company to deliver the stock is to enforce upon the defendant a contract that he never made.

This Court, in its opinion in the leading case of Sawyer *v.* Hoag, 84 U. S., 610, in applying the trust fund doctrine, says:

"It was therefore, a regular system of operations to the injury of the creditor, beneficial alone to the stockholder and the corporation.

"We do not believe we characterize it too strongly when we say that it was a fraud upon the public who were expected to deal with them.

"The result of it was that the capital stock of the Company was neither paid up in actual money, nor did it exist in the form of deferred installments properly secured."

In Clark v. *Beaver*, 139 *U. S.*, 96, 113, this Court says: "That when the interest of the public or of strangers dealing with this corporation is to be affected by any transaction between the stockholders who own the corporation and the corporation itself, 'such transaction should be subject to a rigid scrutiny, and if found to be infected with anything unfair towards such third person, calculated to injure him, or designed intentionally and inequitably to screen the stockholder from loss at the expense of the general creditor, it should be disregarded and annulled so far as it may inequitably affect him.'"

It is conceded that all transactions which are fraudulent or unfair to creditors may be annulled, but there has been nothing either fraudulent or unfair to creditors in the action of the defendant. Any unfairness that may exist is on the part of the corporation towards him. This Court, in Handley *v.* Stulz, 139 U. S., 417, 430, after setting forth the trust fund doctrine, says: "But it does not follow that every creditor has a right to trace each share of stock issued by such corporation, and inquire whether its holder or the person of whom he purchased has paid its par value for it."

Nowhere has such a rule been enforced in a case where, when the Company was solvent and flourishing, the subscriber had endeavored to perform his part of the contract and performance has been refused on the part of the Company.

The defendant is not a stockholder as regards the Company, and he has sufficiently renounced his subscription so that he may say he is not a stockholder as regards creditors. In Pacific National Bank *v.* Eaton, 141 U. S., 227, it is said, "Without express regulation to the contrary, a person becomes a stockholder by subscribing for stock, paying the amount to the company or its proper

officer and being entered on the stock book as a stockholder."

There are many insignia which, taken together, show that one is a stockholder, yet some of them may exist without indicating that one is held out to the world as such. It is not the mere fact that the defendant was denied a stock certificate, but what was implied thereby under the circumstances of the case, viz., that the defendant could not have any shares in the stock of the corporation—that he was not a stockholder. Surely, it cannot be just or logical to say that, though the defendant has a right of action against the corporation for non-delivery of stock, yet the corporation can use his name as one of its shareholders and thus heap up liabilities upon him. Is it necessary that one should go into a court of equity to prevent the continuance of such a liability? If the defendant had sued the company and obtained judgment could this action be maintained? His rights then and there and now are the same, and failure to sue ought not to prejudice them. No man is compelled to sue to enforce his rights. He may pocket his injury if he chooses, and it is not the policy of the law to compel him to go into court. The theory of such a suit would be that he is not a stockholder and has a right of action against the company for the breach of a contract which would have made him one if carried out. This Court should determine his rights for him on that theory.

Point Second.

In any event the plaintiff has mistaken his remedy. There is no foundation for an action at law.

This is an action at law in the nature of debt to recover from the defendant the full amount of the capital stock for which he had at one time subscribed, namely, $15,000.

Conceding, for the sake of the argument, that the breach by the corporation of the contract of subscription might not relieve him from liability to certain creditors,

it is plain that, as between the defendant and the corporation, its refusal to accept his money and deliver him his stock would prevent it from suing him on his subscription, and therefore the plaintiff cannot recover in its right.

At common law an assignee of an insolvent corporation could recover from a stockholder only when the corporation itself could have recovered if the assignment had not been made.

The corporation law of Pennsylvania, under which the Chester Tube and Iron Company was organized, provides that "The officers and stockholders organized under or accepting the provisions of this act shall not be individually liable for the debts of the corporation otherwise than in this act provided."

The act provides for making stockholders parties to an action against the corporation, the levying of an execution against the corporation, and, if it be returned unsatisfied, that the deficiency may be satisfied out of the property of the stockholders so made parties, &c.

Brightly's Purden's Digest, Article "Corporations," VIII., Sections 46, 47, 11th Ed., pp. 345, 346.

In Youghiogheny Shaft Co. *v.* Evans, 72 Penn. St., 334, it is said: "The liability of stockholders is secondary, and the proceedings to enforce it statutory—not at common law. It was, therefore, held in several decisions that in such case the proceeding is wholly governed by statute, and the rights and liabilities of the parties must be ascertained by it."

See also 4th Natl. Bank *v.* Francklyn, 120 U. S., 747, 758.

It may be said generally in respect of enforcing statutory liability of shareholders, that unless the statute expressly provides to the contrary, the suit must be brought by the creditors and not by the corporation or its Receiver.

Taylor on Corporations, Sec. 721.
Farnsworth *v.* Wood, 91 N. Y., 308.
Jacobson *v.* Allen, 12 Fed. Rep., 454.

This liability, whether limited or not, is a security provided by law for the benefit of creditors, over which the the corporation has no control; and, consequently, an attempted assignment by the corporation of the statutory liability of shareholders is inoperative, although made for the equal benefit of all the creditors.

Wright *v.* McCormack, 17 Ohio State, 86.
Dutcher *v.* Marine Bank, 12 Blatch., 435.

In Lane's Appeal, 105 Pa. St., 49, at 58, Green, *J.*, referring to the above statute, says: "This liability is, of course, of a purely statutory character, having no existence outside of legislation, and whenever it is invoked it must be enforced in the very manner prescribed by the other portions of the act. If that kind of remedy is not literally pursued when that particular liability is proposed to be enforced, there can be no recovery. Such were the decisions of this Court in many cases."

It is evident on the face of the complaint that the statutory liability has not been pursued.

The remedy of the plaintiff, if he has any against this defendant, is in equity. The complaint does not contain the allegations necessary for a bill in equity.

The very wording of the rule that the unpaid capital stock is a trust fund shows that it is to be administered in equity and not at law in an action of debt.

Judge Green, in Lane's Appeal, cited *supra*, very ably discusses the creditor's rights aside from statutes as follows: "The capital stock of an incorporated company is a fund set apart for the payment of its debts. The creditors have a *lien* on it in *equity*." He says: "This doctrine results from the character of the capital stock of corporations. It is a trust fund. It exists for the benefit of creditors whenever *their interests and rights require it.* Its payment can be enforced in the modes which are not available to the corporation, and without using its name. Thus, creditors' bills in the names of individual creditors, whether by judgment or otherwise, proceedings by assignees in bankruptcy either directly by bill or by

petition to the Court in bankruptcy, and proceedings by insolvent assignees or receivers under direction of the proper courts, are the ordinary modes in which the rights of creditors are enforced in the circumstances we are now considering. In all of them, however, it is absolutely essential, that in some mode there should be an ascertainment in some form of the fact of insolvency, of the exhaustion of all other assets, of the amount of the debts due by the corporation, of the amount of capital stock required for the discharge of the debts, and a call or assessment upon the stockholders for the payment of the amount necessary to be paid by each. * * * If, however, the corporation refuses to act or is disabled either by the terms of its contract or by its legal incapacity by reason of insolvency or bankruptcy, the assessment must be made by some Court having jurisdiction of the matter and the parties, in some suitable proceeding by way of bill or petition. Upon such proceeding and the establishment of the requisite facts above stated, the Court will either order an assessment to be made upon each stockholder of the amount to be paid by him, and upon such assessment an action can be founded and tried in the common law Courts, or a decree can be made directly against each stockholder who has been made a party and served with process for the payment of the money due by him, and such decree can be enforced by immediate execution process." The Court further says: "Now it is manifest, upon the plainest principles, that in the case of an insolvent corporation, all of whose assets are exhausted except its unpaid capital stock, there can be no recovery against a delinquent stockholder until a call or assessment has been made upon him fixing the amount he is required to pay. * * * If the whole unpaid capital is not required the whole cannot be called. In order to ascertain how much is required there must be an account of debts, assets and unpaid capital taken, and then a decree for an assessment of the amount due by each stockholder."

This case is followed and approved in Bell's Appeal, 115 Pa. St., 88; also 115 Pa. St., 564.

This doctrine has been reiterated time after time in this Court and in the State Courts. We quote the opinion of the Court in Pollard *v.* Bailey, 87 U. S., 520, as follows:

"It is certain that no stockholder is liable for more than his proportion of the debts. This proportion can only be ascertained upon an account of the debts and stock, and a *pro rata* distribution of the indebtedness among the several stockholders. The proper action, therefore, to enforce the liability is one in which such an account can be stated and distribution made. Such an action calls specially for the exercise of the powers of the court of equity which can bring before it all the necessary parties and adjust all their rights. Every stockholder when called upon to perform his obligations, has the right to require that the extent thereof shall then be determined once for all, as well that which he is under to his associate stockholders as that to the creditors."

See also

Terry *v.* Anderson, 95 U. S., 628.
Mills *v.* Scott, 99 U. S., 25.
Hatch *v.* Dana, 101 U. S., 205.
McClean *v.* Eastman, 21 Hun, 312.
Chandler *v.* Keith, 42 Iowa, 99.
Beach on Corporations, Sec. 123.
Taylor on Corporations, Sec. 703.
Morawetz on Corporations, Sec. 868.

The fact that there are creditors who have equities, that the liabilities exceed the assets and the amount of the excess, and the fact that all other remedies have been exhausted, should appear in the bill. These do not appear here either in the complaint or in other parts of the record.

The record does not show that there are any such creditors. Certainly Mr. Wood could make no equitable claim against the defendant for $15,000, as he was himself in default, and if the amount of the indebtedness of the corporation to Mr. Wood be deducted, it would appear that the assets of the company at the time of the assignment were only about $1,000 less than the liabilities.